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SAFE CHOICES:
A New Model for Regulating Health Professions in British Columbia

Part II, Volume 1:
LEGISLATIVE REVIEW

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SAFE CHOICES: A New Model for Regulating Health Professions in British Columbia

Part II: Legislative Review

Irvine E. Epstein, Q.C., Chair

March 2001

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FOREWORD

This report is the result of the Health Professions Council's legislative review of ten health professions pursuant to the *Terms of Reference* from the Minister of Health and Minister Responsible for Seniors. Under the *Health Professions Act* the Health Professions Council is a six-person advisory body appointed by the government of British Columbia to make recommendations to the Minister of Health and Minister Responsible for Seniors about the regulation of health professions. Irvine E. Epstein, Q.C., the Chair of the Health Professions Council, is primarily responsible for the legislative review. The report has been circulated within the Health Professions Council for review and comment.

In the legislative review the Health Professions Council examined two issues:

(1) whether designation of the professions of

- chiropractic;
- dentistry;
- emergency medical assistance;
- medicine;
- naturopathy;
- nursing, registered;
- nursing, registered psychiatric;
- optometry;
- podiatry; and
- psychology

under the *Health Professions Act* would be in the public interest or whether there are unique features of the health professions, or other relevant factors, that justify a continuing need for a separate statute; and

(2) what amendments, if any, are required to the current statute, rules, regulations and bylaws for each of the professions to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in *the Health Professions Act* and discussed in Schedule B to the *Terms of Reference*.

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PART II – VOLUME 1
LEGISLATIVE REVIEW

I. EXECUTIVE SUMMARY

In accordance with the *Terms of Reference*, the Council undertook a review of specific statutes governing ten health professions.

Each of the professional statutes was compared to the *HPA* and the *core principles* of regulation set out in the *Terms of Reference*, with a recommendation made regarding designation of the profession under the *HPA*.

During a consultation process involving not only the specific profession under review but also other health professions and interested parties, the Council expanded its original review to include two additional matters, one requested by the Minister of Health and Minister Responsible for Seniors (Minister) and one which originated from the consultation process.

First, the Minister directed the Council to consider the issue of mandatory membership in professional associations. Second, the Council reviewed the *HPA* in light of submissions made by participants in the review process and established a series of suggested revisions to the *HPA* to improve its effectiveness.

Also, during the review three professions—registered psychiatric nursing, naturopathic medicine and psychology—requested designation under the *HPA,* thus negating the need for further review by the Council.

This report recommends as follows:

RECOMMENDATIONS ON DESIGNATION

- The Health Professions Council recommends that the *Optometrists Act* and the *Podiatrists Act* be repealed and those professions designated under the *Health Professions Act*.

- The Health Professions Council recommends that the *Chiropractors Act*, the *Dentists Act*, the *Medical Practitioners Act*, and the *Nurses (Registered) Act* be repealed and those professions designated under the *Health Professions Act* as soon as revisions are made to the *Health Professions Act* to reflect the unique features of those professions.

- The Health Professions Council recommends that the *Health Emergency Act* not be repealed, and the profession of emergency medical assistance not be designated under the *Health Professions Act*.

RECOMMENDATIONS ON REVISIONS TO THE *HEALTH PROFESSIONS ACT*

- The Health Professions Council recommends that section 20 of the *Health Professions Act* be modified to provide for a more flexible registration process, which would allow the registration committee to delegate approval of applications to the Registrar.

- The Health Professions Council recommends that the *Health Professions Act* be amended to remove the right of the complainant to appear as a party.

- The Health Professions Council recommends that section 40 of the *Health Professions Act* be amended to restrict the right of appeal to the parties in a disciplinary hearing.

- The Health Professions Council recommends that section 19 of the *Health Professions Act* be revised to create a category of matters for which cabinet approval is not necessary.

- The Health Professions Council recommends that the Ministry of Health and Minister Responsible for Seniors take steps necessary to address the issue of delay in the bylaw approval process.

- The Health Professions Council recommends that disciplinary provisions of the *Health Professions Act* be clarified to ensure that they encompass both "professional misconduct" and "conduct unbecoming."

- The Health Professions Council recommends that the *Health Professions Act* be revised to include provision for a summary review process for complaints and a related provision for an internal appeal from a dismissal of a complaint through the summary review process.

- The Health Professions Council recommends that the *Health Professions Act* be amended to include a requirement that discipline committees issue written reasons for decisions made during disciplinary hearings.

- The Health Professions Council recommends that the *Health Professions Act* be amended to adopt a provision similar to section 42 of Ontario's *Health Professions Procedural Code* which provides that:

> *(1) Evidence against a member is not admissible at a hearing of allegations against the member unless the member is given, at least ten days before the hearing,*
>
> *(a) in the case of written or documentary evidence, an opportunity to examine the evidence;*
>
> *(b) in the case of evidence of an expert, the identity of the expert and a copy of the expert's written report or, if there is no written report, a written summary of the evidence; or*
>
> *(c) in the case of evidence of a witness, the identity of the witness.*

- The Health Professions Council recommends that the *Health Professions Act* be revised to include specific provisions for fostering use of alternative resolution, including mediation.

- The Health Professions Council recommends that the Attorney General be given the authority to enforce the provisions prohibiting persons from performing services which should only be done by registered health professionals.

- The Health Professions Council recommends that the *Health Professions Act* be revised to adopt a provision similar to section 26(5)(b) of the *Dentists Act* which provides:

> *If, after giving the applicant an opportunity to be heard, the council determines that at the time of the application an investigation, review or proceeding is taking place in this or any other jurisdiction which could result in the suspension or cancellation of the applicant's authorization to practise dentistry in that jurisdiction, the council may*

> *refuse to grant registration or grant registration for a period or subject to other terms and conditions.*

- The Health Professions Council recommends that the *Health Professions Act* be revised to adopt a provision similar to article 5.05(e) of the *Dentists Act Rules* which provides:

  > *Reporting actions of registrants. Members must advise the registrar without delay if they have reasonable grounds to believe that a current or former registrant:*
  >
  > *(i) has contravened the act or a rule made under it;*
  >
  > *(ii) has failed to comply with a limitation, term or condition imposed under the act or the rules;*
  >
  > *(iii) has been convicted in Canada or elsewhere of any offence that, if committed by a registrant, would constitute conduct unbecoming a registrant or unprofessional conduct;*
  >
  > *(iv) has incompetently practised dentistry or carried out the duties and procedures delegated to him as a registrant;*
  >
  > *(v) has engaged in conduct unbecoming a registrant;*
  >
  > *(vi) has engaged in unprofessional conduct;*
  >
  > *(vii) has failed to comply with an agreement that is binding on him under section 4.1(3) of the act; or*
  >
  > *(viii) is suffering from a physical ailment, emotional disturbance or an addiction to alcohol or drugs that impairs his ability to practise dentistry or carry out the duties and procedures delegated to him.*

- The Health Professions Council recommends the adoption of a peer assessment program similar to that described in section 51 of the *Medical Practitioners Act*, but only if restrictions on use of information during such a process, such as those set out in section 83(1) to 83(4) of Ontario's *Health Professions Procedural Code*, are included.

- The Health Professions Council recommends that the *Health Professions Act* be revised to provide a provision similar to section 71(4) of the *Medical Practitioners Act* which provides:

> *The executive committee may, on the terms it sees fit, stay the operation of any punishment or penalty imposed on a person appealing under this section until the outcome of the appeal, and may require the giving of reasonable security for its costs of the appeal and payment of a fine already imposed as a condition of granting the stay.*

- The Health Professions Council recommends that the *Health Professions Act* be revised to include a provision similar to section 21 of the *Medical Practitioners Act* which provides:

> *Special deputy registrar*
> *21 (1) The council must designate a person appointed under section 20 (3) as the special deputy registrar.*
>
> *(2) The special deputy registrar must*
>
> *(a) receive and investigate complaints of sexual misconduct made to the college;*
>
> *(b) on completion of an investigation of a complaint of sexual misconduct, review the findings of the investigation and recommend the action the sexual misconduct review committee should take under section 28 (2) (d); and*
>
> *(c) perform other duties as directed by the sexual misconduct review committee or the registrar.*
>
> *(3) With the prior approval of the sexual misconduct review committee, the special deputy registrar may authorize an inspector to complete an investigation under this section under the supervision of the special deputy registrar.*
>
> *(4) The special deputy registrar may attempt to resolve a complaint of sexual misconduct informally if the complainant consents and*
>
> *(a) the circumstances warrant informal resolution of the complaint in the opinion of the special deputy registrar, or*
>
> *(b) a direction has been made under section 28 (2) (d) (iii) to make the attempt.*

- The Health Professions Council recommends that the *Health Professions Act* be revised to include a provision similar to section 67(2) of the *Medical Practitioners Act* which provides:

  > *On an inquiry or hearing, the council, executive committee or inquiry committee may employ, at the college's expense, the legal or other assistance it thinks necessary or proper.*

- The Health Professions Council recommends that section 35 of the *Health Professions Act* be amended to add a duty to notify a registrant as well as provide an opportunity to respond to the allegations prior to action being taken under the section, with an exception for cases involving substantial risk to the public, in which case action may be taken without prior notice to the registrant.

- The Health Professions Council recommends that the *Health Professions Act* be revised to include a provision similar to section 62 of the *Medical Practitioners Act* which provides:

  > *Reinstatement of entry in register*
  > *62 (1) If the council directs the erasure from the register of a person's name or of another entry, that person's name or entry must not be again entered on the register except by direction of the council or by order of the Supreme Court or of the Court of Appeal on an appeal.*
  >
  > *(2) If the council thinks fit, the council may direct the registrar to restore to the register a name or entry erased from it, with or without payment of a registration fee, and the registrar must restore it.*

- The Health Professions Council recommends that the *Health Professions Act* be revised to include a provision similar to section 50 of the *Medical Practitioners Act* which provides:

  > *(1) A person who has been convicted of an indictable offence by a court in British Columbia or elsewhere is not entitled to be registered and the council may erase the person's name from the register.*
  >
  > ...

> *(3) The registration of a person must not be refused and the name of a person not be erased for a conviction for a political offence or for an offence that ought not, in the council's opinion, either from the nature of the offence or from the circumstances under which it was committed, to disqualify the person from practising under the Act.*

- The Health Professions Council recommends that all regulatory bodies be called "colleges." This will require changes to the legislation governing registered nursing, optometry and podiatry.

- The Health Professions Council recommends that section 22 of the *Health Professions Act* be amended to provide discretion not to disclose a member's address or phone number where there are reasonable grounds to believe that disclosure may jeopardize the member's safety.

RECOMMENDATIONS ON CHANGES TO THE *HEALTH EMERGENCY ACT*

- The Health Professions Council recommends that the *Health Emergency Act* be amended to include sections 16(2)(d), 16(2)(f) and bylaw 18 of the *Health Professions Act* which provide:

> *16(2) A college has the following objects:*
>
> *(d) to establish, monitor and enforce standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice amongst registrants;*
>
> *(f) to establish, for a college designated under section 12 (2) (h), a patient relations program to seek to prevent professional misconduct of a sexual nature.*
>
> *Patient relations committee*
> *18. (1) The patient relations committee is established consisting of [6] persons appointed by the board.*
>
> *(2) The patient relations committee must include at least [2] public representatives, at least 1 of whom must be an appointed board member.*
>
> *(3) The patient relations committee must*

(a) establish and maintain procedures by which the college deals with complaints of professional misconduct of a sexual nature,
(b) monitor and periodically evaluate the operation of procedures established under paragraph (a),
(c) develop and coordinate, for the college, educational programs on professional misconduct of a sexual nature for members and the public as required,
(d) establish a patient relations program to prevent professional misconduct, including professional misconduct of a sexual nature,
(e) develop guidelines for the conduct of registrants with their patients, and
(f) provide information to the public regarding the college's complaint and disciplinary process.

(4) For the purposes of this section, "professional misconduct of a sexual nature" means

(a) sexual intercourse or other forms of physical sexual relations between the registrant and the patient,
(b) touching, of a sexual nature, of the patient by the registrant, or
(c) behaviour or remarks of a sexual nature by the registrant towards the patient;

but does not include touching, behaviour and remarks by the registrant towards the patient that are of a clinical nature appropriate to the service being provided.

Prior to the enactment of this provision, both the Emergency Health Services Commission and the Emergency Medical Assistants Licensing Board should be consulted about which body is best able to fulfill the duties required by these programs.

- The Health Professions Council recommends that the provisions in the *Health Emergency Act* dealing with the complaints and discipline process be amended to ensure that the investigative and adjudicative functions are entirely separate, and that complainants are afforded a right of internal appeal regarding dismissed complaints.

- The Health Professions Council recommends that the Health Emergency Act be amended to provide for a general rule that disciplinary hearings are open to the public, subject to the list of exceptions set out in bylaw 12(5)(a) to (d) of the *Health Professions Act* Bylaws.

- The Health Professions Council recommends that the following *Health Professions Act* provisions be added to the *Health Emergency Act*:

  1. section 33(4) which deals with the inquiry committee's power to take any action it considers appropriate to resolve a complaint, including mediation;
  2. section 36 which provides that the inquiry committee may resolve complaints by way of registrants' undertakings or consents;
  3. section 37 which describes the contents of a citation;
  4. section 38 which sets out the procedure for a discipline committee hearing; and
  5. section 40 which provides for an appeal by a person aggrieved or adversely affected by a decision of the discipline committee.

RECOMMENDATION ON MANDATORY MEMBERSHIP

- The Health Professions Council recommends the repeal of any provision in any professional statute, rule or regulation that requires members of a regulated health profession to belong, or to pay dues, to a professional association.

RECOMMENDATION ON OVERSIGHT OF REGULATORY COLLEGES

- The Health Professions Council recommends a process be established by the Minister of Health and Minister Responsible for Seniors for the Health Professions Council to provide ongoing review and oversight of the regulatory colleges.

II. INTRODUCTION TO REVIEW PROCESS

The legislative review was conducted pursuant to the *Terms of Reference* issued by the Minister in accordance with section 25 of the *Health Professions Act*, RSBC 1996, c. 183 (*HPA*).

A. THE PURPOSE OF THE REVIEW

The *Terms of Reference* directed the Council to review the governing statutes for each of ten health professions.

The purpose of the review is twofold:

(a) To determine whether designation of the health profession under the *HPA* would be in the public interest or whether there are unique features of the health profession, or other relevant factors, that justify a continuing need for a separate statute.

(b) To determine what amendments, if any, are required to the current statute, rules, regulations and bylaws for each profession to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the *HPA* and discussed in Schedule B to the *Terms of Reference*.

The *Terms of Reference* and the Criteria and Guidelines which expand upon them are included as an Appendix to this report.

B. THE BACKGROUND OF THE REVIEW

The *Terms of Reference* flow from several recent reports of royal commissions and government policy statements which have emphasized that an integrated approach to the delivery of health care is in the public interest. Co-ordination and co-operation amongst health care providers is of fundamental importance to such an approach. Consistency in statutory instruments is crucial to this aim.

A general policy favouring a uniform regulatory structure was referred to in the report of the Seaton Commission on Health Care in British Columbia: *Closer To Home. The Report of the British Columbia Royal Commission on Health Care and Costs* (*Closer to*

Home). The following excerpts are from that part of the Commission's report which deals with regulation of the health professions, on page D-30:

> *There is a lack of consistency among the 16 provincial acts that govern the health care professions, despite the fact that all of the colleges established under the acts have the same legislative mandate: to protect the public from preventable harm. Such inconsistency increases the likelihood of variations in judicial interpretations of the acts. Underlying this situation are persistent jurisdictional disputes and a distinct lack of co-operation among the health care professions.*
>
> ...
>
> *In general, a lack of consistency characterizes the acts with respect to complaints, discipline and appeals, resulting in insufficient public accountability, no uniformity in the structure or organization of the different statutes, and an absence of common terms.*

These views led the Commission to conclude that the existing health professions acts be repealed and the *HPA* be revised to serve as the umbrella act for regulating health professions.

The general policy of legislative uniformity is also consistent with initiatives in several other provinces—notably Ontario, which has implemented umbrella legislation for the health professions, and Alberta, which is in the process of enacting umbrella legislation.

Alberta's *Health Professions Act*, SA 1999, c. H-5.5, or Bill 22, 1999, received Royal Assent on 19 May 1999 and is currently awaiting proclamation.

C. THE ANALYTICAL FRAMEWORK

In reaching its conclusions, the Council considered two main directives, both of which are embodied in the *Terms of Reference*: first, the *HPA* embodies the minimum regulatory standards which should govern all self-regulating professions; and second, designation of all health professions is the preferred option and it is for the individual profession to justify the need for a separate statute.

1. The *Core Principles* of Professional Regulation

The Council's primary task in conducting the legislative review is to determine whether it is in the public interest that a health profession be designated under the *HPA*. The analysis of whether the professional statute contains the *core principles* of professional regulation is an important element in the consideration of whether designation is in the public interest. The extent to which a professional statute currently embodies these *core principles* is clearly one of the factors the Council must consider in making this determination.

2. The *Terms of Reference*

The *Terms of Reference* underscore the importance of uniformity in legislation and the general policy favouring designation. The *Terms of Reference* also refer to the desirability of minimizing the number of statutes that govern the health professions and the importance of a high degree of consistency amongst statutes. They direct the Council to consider specifically whether there are unique features of a health profession or other relevant factors that justify a separate statute. Thus, the onus is on the profession to establish why a separate statute is in the public interest.

One of the first clear positions which became apparent soon after the process started was the widespread opinion that designation under the *HPA* is tantamount to government "taking over" the professions.

The Council does not accept this view. The *HPA* relies on a system of self-regulation, and professions regulated under the *HPA* still have colleges and still have a broad rule-making power. Indeed, the basic structure of the *HPA* is remarkably similar to the current professional statutes. While the Council acknowledges that there is some difference between provisions of the *HPA* and the current professional statutes, the Council also stresses that the *HPA* clearly embodies a strong commitment to the principle of self-regulation. Indeed, the regulation of the actual practice of the profession by its members is left almost entirely to the profession itself.

The following discussion on the principles upon which self-regulation is founded may help erase this erroneous interpretation of the *HPA*.

It is an accepted principle that self-regulation is a privilege, not a right. Government grants a profession certain rights in return for which the profession agrees to regulate the profession in the public interest. This principle has been judicially noted in the British Columbia Supreme Court case of *Costco Wholesale Canada Ltd. v. British Columbia Assn. of Optometrists*, [1998] B.C.J. No. 646. It is the government which maintains fundamental control over self-regulatory bodies through the legislative process.

Thus, it is erroneous to consider that the *HPA* "takes over" a profession by designation. In fact, the legislature has always had the power to regulate directly and indirectly. With self-regulation, it merely delegates some authority to the profession itself. By no means is the power to self-regulate unlimited, nor is the self-regulatory body (college) autonomous.

This balance between professional self-regulation and government oversight is reflected in the *HPA*.

D. THE PROCESS FOR THE REVIEW

The general process for the review provided for an initial meeting with the profession, preparation by the Chair of the Council of a comparative analysis of the profession's current statute with the *HPA*, discussion of the analysis with the profession, drafting of a preliminary report, roundtable discussions with representatives of the health professions under review and a final report.

Initial meetings were held with the professions in 1995. The Chair then completed his comparative analyses and circulated them to the professions under review in 1996. In 1997, the preliminary reports were drafted and sent out, and the roundtable discussions were commenced late in 1998. A separate roundtable discussion was held to discuss the changes to the *HPA*.

The roundtable discussions were completed in early 1999. The professions co-operated with the Council's requests for information and actively participated in the roundtable process.

The process was broad and inclusive, and all professionals were given wide latitude to provide their views on the issues. In addition, all health professions in British Columbia were invited to participate, as well as government agencies and departments and other interest groups. Research was conducted into the regulation of health professions in other provinces and U. S. jurisdictions.

The Chair then completed this comprehensive report, which will be submitted to the Minister.

During the legislative review process, the professions of naturopathic medicine, psychology and registered psychiatric nursing applied to be designated under the *HPA* and to repeal their profession-specific statutes. The Council was thus left with seven professions to review.

There was a notable lack of response from the professional associations representing the health profession membership. The Council prepared a preliminary analysis for each of the ten health profession statutes and sent copies to both the regulatory bodies and the membership associations. Most membership associations made no submissions and often simply agreed with little comment on the submission made by their respective regulatory body. One notable exception to this trend is in the review of the *Nurses (Registered) Act* where the Registered Nurses Association of British Columbia as well as the British Columbia Nurses' Union, not only made separate detailed submissions but often gave opposing views on issues the Council raised. The Council looked forward to this kind of discourse, which was a primary reason for the format of the legislative review process. Separate and detailed submissions from the regulatory bodies and the membership associations could also have stimulated more fruitful discussions within the Council's framework for the legislative review.

At the request of the Minister, the Council also conducted a separate consultation process on the issue of mandatory membership in professional associations. The Council contacted the health professions in British Columbia and the ministers of health of all other provinces and territories, as well as representatives of other professions, such as accountants, architects, engineers, lawyers, social workers and teachers. The Council published the survey on its website. The results of the consultation are discussed in the mandatory membership section of this report, on page 76.

III. ANALYSIS OF LEGISLATION

The Council's primary focus in conducting the legislative review is to determine whether designation of the health professions under the *HPA* would be in the public interest, and a key element of this task is to determine whether the existing health profession statutes contain the *core principles* of professional regulation reflected in the *HPA* and discussed in the *Terms of Reference*.

The Council made the following recommendations in nine preliminary reports:

First, the Council recommended that seven health professions statutes be repealed and that the professions be designated under the *HPA*. They are the following acts:

- *Chiropractors Act*, RSBC 1996, c. 48,
- *Dentists Act,* RSBC 1996, c. 94,
- *Naturopaths Act,* RSBC 1996, c. 332,
- *Nurses (Registered) Act,* RSBC 1996, c. 335,
- *Optometrists Act,* RSBC 1996, c. 342,
- *Podiatrists Act* and RSBC 1996, c. 366,
- *Psychologists Act*, RSBC 1996, c. 381.

Second, the Council made a qualified recommendation with respect to the *Medical Practitioners Act*, RSBC 1996, c. 285, that it be repealed and the profession be designated under the *HPA,* provided the *HPA* is amended to include the suggested revisions discussed in the report.

Third, the Council recommended that the *Health Emergency Act*, RSBC 1996, c. 182, be retained as a separate statute.

This section of the report discusses significant issues which arose from the submissions by the health professions to the Council's consultation process. The section is organized around the five *core principles* of professional regulation described in the Council's *Terms of Reference*.

A. MANDATE OF THE REGULATORY BODY

The *Terms of Reference* emphasize two issues regarding this core principle:

i. barriers to interdisciplinary practice are not in the public interest; and

ii. it is important that there be a clear separation between the professional association and the regulatory body.

The following issues were raised by the Council's review of the health professions' legislation.

1. Barriers to Interdisciplinary Practice

Barriers to interdisciplinary practice were discussed by the Seaton Commission in its report *Closer to Home*, on page D-35:

> *In addition to broadly stated scopes of practice, there are other barriers to practice. For instance, there is no reason why a member of one profession should not be allowed to be a member of another profession. A provision in any regulation, rule, bylaw or Code of Ethics which prevents this from happening is inappropriate. It may be in the profession's interest to have such a prohibition, but it is not in the public interest.*
>
> *Some of the existing professional legislation makes it an offence for a member of a college to work in association with someone who is not a member of that college. But as long as the non-member does not practice within the profession's narrow scope of practice, the commission does not believe there is any substantial reason why a member of a college should not be allowed to work in co-operation or partnership with someone who is not a member. In fact, a multi-disciplinary practice may be beneficial and should be encouraged.*

The Council agrees with these comments about interdisciplinary practice and has noted in its preliminary reports that several of the profession-specific statutes contain prohibitions against interdisciplinary practice. The prohibitions usually forbid registrants of a college to practise in association with a non-registrant. Some provisions prohibit affiliation or the establishment of a partnership with non-registrants.

For example, section 93(1) of the *Medical Practitioners Act* makes it an offence to practise medicine in partnership with a non-member unless the written consent of the Executive Committee of the College of Physicians and Surgeons of British Columbia (CPSBC) is obtained. The primary concern with this section is that broadly applied, it can create unnecessary barriers to the practice of other health professions. Although the CPSBC indicated that it uses the section to ensure that its members meet appropriate standards and practise in a manner consistent with those standards, it appears that the CPSBC has adopted a broad interpretation of the section, thus creating barriers to interdisciplinary practice.

To illustrate, the CPSBC uses this section to restrict access to laboratory facilities in British Columbia The CPSBC takes the position that diagnostic testing is the practice of medicine, requiring supervision by medical practitioners so that all diagnostic facilities are operated by physicians. In conjunction with section 93, this position allows physicians to prohibit access to the facilities, both public and private, by other health professionals. The Seaton Commission identified this practice as a barrier to interdisciplinary practice, on page C-113:

> *The Medical Services Commission has generally interpreted the Medical Services Act and the Medical Practitioners Act to mean that only physicians may own laboratories. But we can find nothing in the Medical Services Act to support this interpretation. A non-physician is quite capable of managing the daily operations of a laboratory, and that is, in fact, what happens at present. A pathologist must be available to provide clinical expertise as required. But we believe that laboratories are, in reality, business enterprises, and should be treated as such, rather than as medical practices.*

In its *Medical Practitioners Act Legislative Review (Preliminary Report)* the Council determined that it is inappropriate to give exclusive power of governance over diagnostic facilities to medical practitioners as it has the potential to create unnecessary barriers to interdisciplinary practice. Thus, while the Council appreciates the concerns the section attempts to address, the powers this section creates and the severe remedy that may be imposed go beyond what is necessary to address these concerns.

The problem with section 93(1) is that it creates an outright ban, subject to limited exceptions, when less stringent measures would suffice. For example, in Alberta a physician is able to refer to a non-regulated health professional as long as no harm is caused to the patient:

> *A referral to a non-regulated health care provider is acceptable when the physician is satisfied that those services can reasonably be expected to benefit the patient, and not cause harm.*

> [*College of Physicians and Surgeons of Alberta Policy.* Practice in Association. *Original: April 1997, updated: March 1998, section (10).*]

A complete barrier to interdisciplinary practice is not in the public interest. As the Seaton Commission stated, as long as the non-member does not practice within the profession's scope of practice, there is no reason why a member of a college should not be allowed to work in co-operation with someone who is not a member.

The *Chiropractors Act* contains a provision that creates a barrier to dual licensure:

> *Practice*
> *21 (1) Subject to subsection (2), a person registered as a chiropractor under this Act must not engage in the practice of the diagnosis or treatment of the human body for disease, or the causes of disease, otherwise than as a chiropractor, unless the person,*
>
> > *(a) first applies to have his or her name stricken from the register of members of the college, and*
> >
> > *(b) discontinues the use of the name "chiropractor", whether by way of advertisement or in any other manner that might signify that he or she was practising as a chiropractor within the meaning of this Act.*

This provision clearly restricts dual licensure as it prohibits a registrant from practising the profession other than as a registrant of the college unless the registrant has his/her name stricken from the register of members of the college or discontinues the use of the reserved title of the profession. For example, a chiropractor could not practice both chiropractic and physical therapy.

In Ontario, chiropractors are entitled to be members of other health professions, both regulated and unregulated, and the College of Chiropractors of Ontario has enacted a policy to address the regulatory issues. The policy provides, in part:

> *Dual registrants are required to inform the patient that the proposed treatment is outside the scope of practice of chiropractic and that the proposed treatment would not be administered in the registrant's capacity as a chiropractor;*
>
> *the client/patient must understand in what circumstances he or she is receiving treatment from the dual practitioner in his or her capacity as a*

> *chiropractor, and in what circumstances he or she is receiving treatment which is outside the scope of the practice of chiropractic.*
>
> (CCO Policy: P- 018. Dual Registrants. Executive Committee, College of Chiropractors of Ontario. Approved by Council: 29 July 1995, re-affirmed by Council: 1 November 1997.)

In the *Chiropractors Act Legislative Review (Preliminary Report)*, the Council stated that allowing dual licensure and giving the British Columbia College of Chiropractors the power to regulate the matter is more in accordance with the public interest than an outright ban.

In sum, barriers to interdisciplinary practice in any form, and especially in the form of an outright ban, are not in the public interest. This is not to say, however, that individuals members can be compelled to practice with other health professionals, simply that they should not be prohibited from doing so if in their judgment the best interests of the patient would be served by so doing.

2. Relationship Between Regulatory Body and Professional Association

The Seaton Commission dealt with the issue of membership promotion and self-regulation when it recommended that "two separate bodies be created for all regulated or licensed professions so that there is a clear separation of membership promotion functions and licensing and discipline functions." The Seaton Commission felt that without this separation the public protection function of the college would become blurred with the membership promotion function of the professional association.

The Seaton Commission's views echo those of the report *Health Security for British Columbians,* Special Report: Consumer Participation, Regulation of the Professions, and Decentralization, the Report of Richard D. Foulkes (*Foulkes Report*). In a chapter on public regulation and the professions, on page 133, Chapter 3, Tome Three, Professor J.T. McLeod stated:

> *It is only reasonable to recognize that professions, like other groups and individuals in society, may well be expected to have certain private self-interests of their own which are not coincident with the public interest. Recognition of a degree of real or at least potential conflict between the private interest of the profession and the public interest is the root of the necessary distinction between the professional or licensing body on the one hand, whose purpose is to enforce standards of quality and service, and the voluntary association of the profession on the other hand, whose*

> *legitimate function is to advance the particular interests of the profession and its membership. This important distinction between the public function of the licensing body and the private function of the voluntary association is now widely recognized in Canada. From the standpoint of both the professions and the public, it is desirable that the separation of the two functions be kept sharp and distinct.*

The Council agrees with these comments and believes it important that there be a clear separation between the professional association and the regulatory body.

The comparative analysis of the health profession statutes under review illustrated many provisions where the separation between the regulatory body and the professional association was ambiguous and sometimes non-existent. For example, the professional associations for podiatry and optometry have the power to administer the disciplinary authority of the regulatory body and are effectively performing the function of the regulatory body. The professional association for podiatry is charged both with the duty of serving and protecting the public as well as advancing the economic welfare of its members. Under the *Optometrists Act*, membership with the British Columbia Association of Optometrists is mandatory. Without membership, a person is not entitled to practice optometry. Further, the association is granted professional disciplinary powers over its members.

Another matter arising from the relationship of the regulatory body and professional association concerns college involvement in "economic" or fee-related matters of the health profession. Since health profession colleges are charged with the duty of serving and protecting the public, their participation in negotiating fee-related matters for the health profession could be in direct conflict with their primary duty to the public.

Provisions in profession-specific statutes and regulations which set out unnecessary rules regarding premises for the practice of the profession and provide for restrictive rules regarding advertising are indicative of the regulatory body's interest in the economic affairs of its members. Economic issues affecting the members are a proper concern for the membership association whose essential role is to serve the interests of its members.

In sum, activities of a regulatory body to promote the economic, political and professional interests of its members must not compromise, and should not be seen to compromise, its ability to regulate the profession in the public interest. The *HPA* relies on a structure that prohibits the melding of roles between the regulatory body and the professional association. Thus, the concerns discussed in this section would be addressed were all professions governed under the *HPA*.

3. Power to Approve Educational Programs

In four profession-specific statutes, the regulatory body plays some role in the approval of educational programs. Under the *Nurses (Registered) Act*, the regulatory body may make rules regarding qualifications for admission to approved schools, and the board must be satisfied as to an applicant's qualifications before she or he may be admitted to an approved school. These functions are beyond the proper scope of the mandate of a regulatory body.

The Council recognizes that the regulatory bodies are knowledgeable about the health profession and can be a valuable and primary resource in designing educational programs. Although it may be appropriate for the colleges to set admission requirements for entry to the practice of the profession and to have input on curriculum development, giving them the power to approve schools is more than the public interest requires. A regulatory body's role in "approval" of educational programs should be limited to approval for the purposes of registration. It should not be given the power to determine whether a school can exist at all. Further, while it is appropriate for a regulatory body to regulate the entry of professionals into practice, it is not necessary or desirable for the regulatory body to have such a role in the admission of applicants to educational programs.

Virtually all health professions are given the power to determine which educational programs meet their educational requirements. In many instances, the regulatory body relies on the opinions of national or international accreditation bodies. The decision as to whether a particular institution will be approved for registration purposes is clearly significant as it can affect many potential registrants and may arbitrarily limit the number of practitioners in the profession. Therefore, it is important that all health professions give careful consideration to this issue and act in the public interest, so as not to use arbitrary standards as a barrier to entry into practice. The Council also supports independent oversight in this area, and believes that rules adopted by regulatory bodies should be subject to cabinet approval.

However, the Council does not believe it is in the public interest to simply remove approval powers from the health profession colleges without ensuring that some body is responsible for approving health profession schools. The solution may be to have the health profession colleges act in an advisory capacity to government, which will have the final decision-making power.

4. Interim/Permanent Injunction Powers

Section 52 of the *HPA* provides that a board may apply to the Supreme Court for an interim or permanent injunction to restrain a person from contravening the act, the regulation or its bylaws. The Council dealt with this issue in several preliminary reports. Naturopathic physicians, registered nurses and chiropractors offer no objection to the inclusion in their statute of an injunction power to protect the public from registrants who have violated, are about to, or currently violate the act, regulations or bylaws. This provision is an important public protection measure which should be included in a health profession statute.

In its submission on this provision, the College of Physicians and Surgeons of British Columbia raised an issue about enforcement of professional statutes. That issue is addressed on page 62 in section V of this report "Revisions to the *Health Professions Act*."

B. REGISTRATION REQUIREMENTS FOR ENTRY INTO THE PROFESSION

Schedule B to the *Terms of Reference* makes three important points under this heading:

- First, natural justice and fairness must be reflected in the admission criteria and application process for newly graduated and foreign trained applicants.
- Second, there must be objective requirements for registration and accreditation of education programs.
- Third, applicants should have appropriate rights of appeal affecting registration decisions.

1. Requirement of "Good Character"

The *core principle* that there must be objective requirements for registration poses a significant issue with respect to the typical registration requirement of "good character" or "good moral character." A number of submissions by the health professions point out the significance of such requirements for registration with a college. For example, one health profession states in its submission:

> *...[T]his requirement is in the public interest. These factors impact significantly on a person's suitability to practice a health profession. Thus the mandate of regulatory bodies should include the right and ability to fully investigate and assess such matters.*

Similarly, one regulatory body states that:

> *...[It] is in the public interest as it establishes as paramount the principle that only persons of good character are to be registered with the College.*

Essentially, the six health professions that require applicants to be of "good character" or "good moral character" justify it as being in the public interest. The Council's initial concern was that the terms may inject a significant degree of subjectivity into the decision-making process. However, the Council recognizes the need for such provisions and is satisfied that the *core principles* of professional regulation are not violated. The concept of good character has long been recognized in the common law as an appropriate requirement for registration in professional bodies. The Council emphasizes that this discretionary power be exercised with utmost consistency and fairness.

2. External Appeal of Registration Matters

One of the *core principles* under this heading is the provision for appropriate rights of appeal affecting registration decisions. The *HPA* contains such a right under section 20(4):

> *A person whose application for registration as a member of a college is refused by the registration committee may appeal the refusal to the Supreme Court . . .*

Six of the health profession statutes reviewed by the Council do not contain an external right of appeal, though some provide for an internal appeal, usually to the college's board. One profession submitted that an external right of appeal is an unwarranted intrusion on a regulatory body's discretion to determine who may become a member of the profession. However, the trends in recent case law indicate that courts do defer to administrative tribunals acting within their area of expertise. Further, given the serious implications of registration decisions which involve the right to practice one's profession, a health profession statute must contain an express right of external appeal from registration decisions.

3. Registration Process

Section 20(1) of the *HPA* provides:

> *The registration committee is responsible for granting registration of a person as a member of its college.*

Several health professions disagree with the registration process under the *HPA*. Some health professions, generally those with large numbers of practitioners, indicated that the process of registration is an administrative process which is handled by their registrar. Other, generally smaller, professions stated that their board handles all registration decisions directly, without the assistance of a committee or registrar.

Under the *HPA*, a health profession college must create a registration committee to handle all applications. During the review process, the Council was persuaded that the creation of this committee should be discretionary. For professions in which there are set mechanisms and bodies in place to handle the registration process in a competent manner or where there are very few applications for registration received, a registration committee need not be established. Further, for larger professions where the requirements for registration are so clear that they leave nothing to do for the appropriate committee but to ensure compliance therewith, the registrar can aptly handle this administrative task.

In order to address the concerns raised by the professions, the power to deal with applications for registration ought to be granted to the college boards, and provision made for delegation of that task to either a committee or the registrar. Additional comments regarding the committee structure and the registrar's role under the *HPA* will be made in the section, "Revisions to the *Health Professions Act*," commencing on page 54.

C. QUALITY ASSURANCE MECHANISMS

Schedule B of the *Terms of Reference* states that there should be:

- effective mechanisms for monitoring practitioner competency including the ability to set continuing education requirements, and
- a committee of the board should be responsible for reviewing standards of practice and codes of ethics.

During the review, all health professions provided information about their quality assurance mechanisms. While the programs vary amongst the professions, all have programs in place to maintain professional competence that indicate substantial compliance with this *core principle*.

For example, the Registered Nurses Association of British Columbia maintains a nurse-client relations program which seeks to prevent professional misconduct of a sexual nature. It also endorses the codes of ethics of both the Canadian Nurses Association and the International Council of Nurses and is involved in a project aimed at updating the codes of ethics. Similarly, the College of Dental Surgeons of British Columbia maintains a patient relations program, a committee with the responsibility for developing a standards of practice document, and has had an ethics committee for four decades. The College of Physicians and Surgeons of British Columbia maintains several committees committed to monitoring practitioner competence, including the Preliminary Review Committee and Sexual Misconduct Review Committee, the Ethical Standards and Conduct Review Committee, and the Committee on Office Medical Practice Assessment.

The Council was impressed by the commitment of all health professions to the task of quality assurance. All appear dedicated to maintaining high standards of excellence and ensuring public-protection in the public interest. Two specific issues are worthy of comment.

1. Continuing Education

Although some professions have mandatory requirements for continuing education, several professions indicated that mandatory education requirements were not the best means of ensuring continuing competency and quality practice. For example, the College of Physicians and Surgeons of British Columbia stated:

> *With respect to mandatory continuing education, there is considerable evidence that this does not significantly alter the actual performance of physicians. We would be pleased to provide copies of literature which support this view. In addition, the available mandatory continuing education does not always match the needs of the physician. Rather than mandating participation in specific medical education activities, the College has elected to do evaluations of physicians' actual performance in practice. Programs such as the Office Medical Practice Assessment Program ... and the Triplicate Prescription Program, which monitors the use of narcotics, are examples of such evaluation of performance.*

The Council agrees with these comments about mandatory continuing education and accepts that it is only part of the greater goal of ensuring quality practice. Many other mechanisms, such as those described above, are equally if not more effective in ensuring quality practice. These other mechanisms also ensure that a regulatory body can tailor the programs to match the needs of its profession. The core principle regarding quality assurance appears to recognize these other mechanisms, as it states only that that there should be the ability to establish continuing education requirements, not that they should be mandatory. In the final analysis, it is up to each profession, in accordance with its public interest mandate, to determine the appropriate means of ensuring quality practice.

2. Committee Structure

Several professions indicated that the committee structure under the *HPA* is too onerous. Section 19(1)(t) states:

> *A board may, by bylaw for its college, do the following:*
>
> ...
>
> *(t) establish a registration committee, a quality assurance committee, an inquiry committee, a discipline committee, a patient relations committee, and other committees the board determines are necessary or advisable;...*

The British Columbia College of Chiropractors stated that this section imposes onerous administrative structures, and the need for numerous committees when the board of their college is already responsible for matters which may fall within the mandate of such committees. For example, the British Columbia College of Chiropractors stated that its board deals directly with most quality assurance matters. The Council accepts this submission, and agrees that the legislation governing the professions must be sensitive to the administrative burden imposed on regulatory bodies. Unless there is a demonstrated need for a specific committee to deal with an issue, regulatory bodies ought not to be required to create such committees. Section 19(1)(t) appears to recognize this, as it is discretionary, and does not mandate that regulatory bodies establish all of these committees.

D. COMPLAINTS AND DISCIPLINARY PROCESS

A review of the *HPA* and the principles outlined in schedule B to the *Terms of Reference* indicates that a designated health profession's complaints and discipline process must, at a minimum, incorporate the following key elements:

i. the investigative and adjudicative bodies must be made up of different people and the bodies administered independently;

ii. dissatisfied complainants and registrants must be afforded rights of appeal;

iii. the process must be consistent with the rules of natural justice, and provide for proper notice of a proceeding and a right to be heard; and

iv. the process must not be complex: complainants and registrants must understand how the process works.

Under the existing regulatory system, each health profession has its own complaints and discipline process, and wide variations exist in how disciplinary matters are addressed by the professions. The Council analyzed each profession's system in detail. While some professions generally satisfied the *core principles* set out in the *HPA* and *Terms of Reference*, others fell far short. Further, virtually every profession contained some provisions which were inconsistent with the *core principles* of regulation. This section contains a summary of the significant issues raised in the Council's review.

1. Inquiry Committee Procedures

Under the *HPA*, the inquiry committee is responsible for investigating complaints, and has the power to dismiss the complaint or order that a disciplinary committee be convened to conduct a hearing. Section 33 of the *HPA* requires that certain minimum procedures be followed by the inquiry committee including investigating a complaint, requesting the registrant who is the subject of an investigation to provide it with any information, and considering such information.

Several health profession statutes do not contain such provisions though most indicated that similar procedures are followed in practice. At least one profession objected to the inclusion of such provisions. The College of Dental Surgeons of British Columbia stated that these requirements would make the "investigating body a decision making body with all the attendant problems", and that an investigating body should not have to observe the rules of natural justice.

However, recent jurisprudence clearly indicates that even in circumstances where natural justice does not apply, procedural fairness does and there is always a duty to be fair. Further, section 33 of the *HPA* provides basic, minimum fairness requirements, and are far from onerous to apply in practice. All health profession statues ought to contain a similar provision.

However, the Council accepts the submissions of several professions which stated that the requirement for a committee to investigate all complaints is too onerous, and that a more expeditious process is appropriate in many cases. This issue will be discussed further in section V, *Revisions to the Health Professions Act*, on page 59.

2. Right to Internal Appeal

The right to an internal appeal refers to the right of a complainant to appeal a decision to dismiss a complaint. Section 34(2) of the *HPA* provides a complainant with a right to appeal such a decision to the board of a college.

Several of the existing statutes provide rights of internal appeal though some do not. The professions which do not have a formal right of internal appeal indicate that in practice complainants are entitled to request a review. No profession raised significant objections to this provision, and the Council believes that this right should be part of the legislative scheme for all health professions. The right of external appeal through the courts is not economically feasible for many complainants.

3. Separation Between Investigative and Adjudicative Functions

The *core principles* dictate that the investigative and adjudicative bodies must be composed of different people and administered independently of each other. Several of the professional statutes contain provisions which are inconsistent with this principle. For example, one health profession statute allows the same persons who initially receive the complaint to adjudicate upon it. Another statute allows the board of the college to initiate investigations, adjourn them and suspend registrants pending disciplinary hearings. Further, the same board can review a complaint after it has been heard, and can make rules "creating discretionary powers related to the discipline and control of currently or formerly registered members". Finally, the council of one health profession's college selects from amongst itself the persons to conduct a hearing, and then determines the penalty to be imposed after the matter has been heard.

Such situations raise the potential for overlap between the investigative and adjudicative functions. Separation of these functions is not only a core principle, it is a fundamental principle of administrative law. The people hearing a disciplinary matter must have no prior knowledge of the subject matter of the complaint or investigation. This principle is embodied in part III of the *HPA* which provides that the inquiry committee is responsible for investigating complaints and the discipline committee conducts the hearings.

4. Open Disciplinary Hearings

Section 38(3) of the *HPA* sets out the general rule that discipline hearings are open to the public. It also sets out the circumstances in which the discipline committee may conduct hearings *in camera*.

Section 38(3) of the *HPA* states:

> *(3) A hearing of the discipline committee must be in public unless*
>
> *(a) the complainant or the respondent requests the discipline committee to hold the hearing in private, and*
>
> *(b) the discipline committee is satisfied that a private hearing would be appropriate in the circumstances.*
>
> *(4) At a hearing of the discipline committee,*
>
> *(a) the testimony of witnesses must be taken on oath, which may be administered by any member of the discipline committee, and*
>
> *(b) there must be a full right to cross examine witnesses and call evidence in defence and reply.*

Sections 23(3) and 12(5)(a) to (d) of the Model Bylaws under the Health Profession Bylaws provide more detail regarding the circumstances in which the public may be excluded from a disciplinary hearing:

> *(5) The board may exclude any person from any part of a meeting if it is satisfied that*
>
> *(a) financial or personal or other matters may be disclosed of such a nature that the desirability of avoiding public*

> *disclosure of them in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that meetings be open to the public.*
>
> *(b) A person involved in a criminal proceeding or civil suit or proceeding may be prejudiced.*
>
> *(c) Personal matters or property acquisitions will be discussed.*
>
> *(d) The contents of examinations will be discussed.*
>
> *(e) Communications with the Office of the Ombudsman will be discussed, or*
>
> *(f) Instructions will be given to or opinions received from legal counsel for the college, board, or committees.*

Several health profession statutes contain a provision requiring that disciplinary hearings be held in the absence of the public. Generally, the professions support closed hearings on the basis of sensitivity and the fear that complainants will be discouraged from bringing forth complaints. The College of Psychologists of British Columbia makes a specific objection:

> *Making disciplinary hearings open to the public will be undesirable to a large number of complainants. This is especially true in the mental health area given the still common stigma of mental health problems. While 37(a) and (b) allow non-public hearings in certain cases, it should be obvious that the popular media, depending on the anticipated titillating or scandalous content of the hearing, will fight against closed hearings if there is an opportunity for an open hearing. In fact, the spectre of a public hearing in which one's mental health and/or sexual history are examined and cross-examined may lead to fewer complaints by legitimately harmed patients.*

The Council appreciate the sensitivity of disciplinary proceedings, and the potential impact on people's privacy. At the same time, the Council believes it important that these hearings be open to the public in order to ensure that the process is fair and to ensure that the regulatory bodies are fulfilling their mandate to protect the public. That said, the Council appreciates that in certain circumstances, hearings should be closed. That is the purpose of the exceptions described above. Rather than closing all hearings, the Council supports a general rule of open hearings subject to exceptions in specified circumstances.

5. Mediation and Alternative Dispute Resolution

Section 33(6) of the *HPA* empowers the inquiry committee to take measures to informally resolve complaints. It states that the inquiry committee may "take any action it considers appropriate to resolve the matter." Section 63 of the Model Bylaws under the *HPA* sets out procedures for mediation. In addition, section 36 of the *HPA* empowers the inquiry committee to resolve matters by asking a registrant to make undertakings and consent to a reprimand.

Alternate dispute resolution (ADR) is widely accepted throughout society as a process that promotes settlement of issues without the time, expense and emotional involvement associated with traditional dispute mechanisms. In the courts, increasing recognition of the limits of ordinary litigation as a means of resolving disputes, crowded trial lists and concerns about expense and delay make litigation less attractive. Further, a general consensus appears to have developed that participants in the process appreciate the informality, efficiency and speed with which matters are resolved.

ADR takes different forms. In arbitration, a dispute is submitted to an arbitrator for a decision. Arbitration may be binding or non-binding (advisory). Mediation is also a form of ADR. It is a process for resolving disputes with the aid of a neutral third party. The third party's role is to assist the parties, privately and collectively, to identify the issues in dispute and develop proposals to resolve the disputes.

Several health profession statutes contain provisions for various forms of ADR. Other professions engage in ADR as a matter of practice. Virtually all health professions strongly support ADR. Likewise, the Council is convinced that ADR has a strong role to play in professional disciplinary matters, and broad provisions ought to be enacted in order to grant the necessary powers to the professions to engage in ADR. The Council will discuss this issue further in the section "Revisions to the *Health Professions Act*," on page 62.

6. Offences

Section 51(3) of the *HPA* prohibits prosecution of offences under the *HPA* after two years. Most health professions statutes do not contain such a provision but little objection was made to this provision. One profession submitted that a two-year limitation is inadequate because many complaints are not made within two years. However, this provision applies to offences under the *HPA*, not to disciplinary proceedings launched by a regulatory body, and the Council supports the inclusion of this provision.

Sections 13, 19 and 30 of the *HPA* create offences for practising a profession under the *HPA* when prohibited to do so, for registering or continuing to be registered as a member when not qualified to do so, and for obstructing an inspector in the lawful performance of his or her duties. Section 81 of the *Dentists Act* provides that it is an offence for a person to give a public demonstration of skill in the practice of dentistry or to demonstrate or exhibit to the public specimens, models or examples of work. The Council recognizes that the role of a college includes regulating advertising and marketing of services. However, the Council believes that the disciplinary powers of a regulatory body are sufficient to address such matters, and that creating an offence and the stigma that goes with it is more than is necessary to regulate such matters. The offence provisions of the *HPA* adequately address the matters for which penal sanctions are appropriate.

7. Uniform Complaint and Disciplinary Process

Quite aside from the issue of consistency with the *core principles* of regulation, another advantage of the *HPA* model is that it creates a uniform complaints and discipline process. The Council believes this to be a significant advantage over the present regulatory system. Under the existing regulatory system, each profession is governed by its own professional statute. The terminology used as well as the regulatory structures and processes created vary widely from profession to profession, especially with respect to the complaints and discipline process. This variation and resulting complexity is confusing to the public and registrants. A uniform regulatory system under the *HPA* would eliminate much of the complexity and confusion, and foster the development of a common jurisprudence for the health professions.

The Seaton Commission on page D-30 made a strong recommendation for establishing a uniform complaints and discipline process among British Columbia 's health professions:

> *There is a lack of consistency among the 16 provincial acts that govern the health care professions, despite the fact that all of the colleges established under the acts have the same legislative mandate: to protect the public from preventable harm. Such inconsistency increases the likelihood of variations in judicial interpretations of the acts. Underlying this situation are persistent jurisdictional disputes and a distinct lack of cooperation among the health care professions.*
>
> ...

In general, a lack of consistency characterizes the acts with respect to complaints, discipline and appeals, resulting in insufficient public accountability, no uniformity in the structure or organization of the different statutes, and an absence of common terms. The areas of greatest inconsistency are:

- *the college's rule-making authority*
- *the way complaints are received and addressed,*
- *The requirement to report incompetent members,*
- *the power to discipline former members,*
- *the use of pre-hearing suspensions,*
- *the availability of judicial restraining orders or injunctions,*
- *the description of the acts or omissions which may lead to a disciplinary action,*
- *the type of disciplinary action which may be imposed,*
- *the awarding of costs at the end of a disciplinary hearing and the maximum amount which can be awarded,*
- *the procedures by which disciplinary hearings are initiated, held and resolved,*
- *the member's rights, such as notification of hearings and obtaining a decision with reasons,*
- *the procedures to address a member's failure to appear at a hearing,*
- *the college's powers at a hearing,*
- *the right of appeal, what may be appealed and the limitation period for initiating an appeal,*
- *the requirement that an internal review take place prior to initiating an appeal to the Supreme Court and the requirements for such review*

...

The Health Professions Act has the potential to influence significantly the future of self regulation of health care professions. Under this new Act, the Health Professions Council can make recommendations to the minister concerning which groups should be granted self-regulation status, their titles, and the extent of their scopes of practice, if any. The Act could be used to create uniform legislative procedures.

In its 1995 report *Principles and Recommendations for the Regulation of Health Professionals in Alberta*, Alberta's Health Workforce Rebalancing Committee recommended on page 12 (recommendation 10) that,

> [P]*rofessional legislation should incorporate a range of structures and processes to address consumer and professional concerns about unethical or incompetent professional practice*.

The Committee stated that common structures and processes be established for all regulated health professions and that the processes be as open and as transparent as possible to the complainant and to the public.

Similarly, in the United States the Pew Health Professions Commission (Pew Commission), in its report, *Reforming Health Care Workforce Regulation, Policy Considerations for the 21st Century*, Report of the Taskforce on Health Care Workforce Regulation, recommended on page 29 that, "[s]tates should maintain a fair, cost effective and uniform disciplinary process to exclude incompetent practitioners to protect and promote the public's health." It also proposed the following policy option:

> *Establish uniform complaints and discipline processes for all regulated health professions to ensure that all investigations of complaints are handled in an objective, prioritized, and timely manner. The concerned parties should be informed of the progress of the complaint and investigation on a regular basis.*

The Pew Commission found that problems in this area fall into four categories: First, there is insufficient information dissemination to the public; second, complainants are often not informed about the progress of their complaint; third, boards are not seen as vigorously pursuing complaints of health professionals' misconduct or incompetence; and fourth, boards are often criticized for taking too long to resolve a complaint and for imposing inappropriate or ineffective sanctions.

Thus, the Seaton Commission, the Health Workforce Rebalancing Committee of Alberta and the Pew Health Professions Commission call for uniformity in the complaint and disciplinary process of health profession colleges. The Council agrees with these recommendations.

E. ACCOUNTABILITY MECHANISMS

Schedule B to the *Terms of Reference*, under the heading, Accountability Mechanisms, states that there should be a requirement for government approval of rules or bylaws. Such a provision is embodied in section 19(3) of the *HPA*. Further, section 19(5) provides that the Minister may request a board to amend or repeal an existing bylaw or make a new bylaw for the college if the Minister is satisfied that this is necessary or advisable. Section 19(6) of the *HPA* provides that where a board does not comply with a request under section 19(5), the Lieutenant Governor in Council may amend or repeal the existing bylaw for the college or make the new bylaw for the college.

1. Cabinet Approval of Rules

Section 19(3) of the *HPA* provides that a regulatory body's rules do not take effect until they are approved by cabinet. Before addressing the concerns raised, the Council will provide some background regarding the principles of self-regulation.

It is well established that self-regulation is a privilege not a right. Government grants a profession certain rights, such as the exclusive right to use a title or perform certain services, in return for which the profession agrees to regulate the profession in the public interest. As the Seaton Commission stated on page D-29:

> *The purpose of regulating members of a profession is to protect the public from preventable harm. The privilege of self-regulation is granted to a profession by the provincial legislature. It is a social contract between the profession and the public. It is the property of the public the profession claims to serve.*
>
> *Self government is simply a delegation by the state of its regulatory authority in the professional sphere.* (Emphasis added)

In the Supreme Court decision of *Costco Wholesale Canada Ltd. v. British Columbia Association of Optometrists*, [1998] B.C.J. No. 646, Mr. Justice Lowry emphasized the public nature of a regulatory college's rules:

> *The rules are not merely private and non-governmental in nature, but have a direct and indirect public dimension in carrying out the government's regulatory scheme.*

In that decision, the Court struck down various rules under the *Optometrists Act* as being in violation of the *Canadian Charter of Rights and Freedoms*.

The nature of the relationship between self regulatory bodies and the state was also addressed in the Foulkes Report on page 136:

> *Thus it is clear that the principle of state primacy over professional decisions has been understood and established over a considerable period of time. In this manner it has been established that the state has not only a continuing and lively interest in the regulation of professions, but that the state has merely delegated to the professions the power of self-government as long as that power is exercised in a manner consistent with the public interest. The state has not abdicated its ultimate authority, but has established the primacy of public legislation over the private regulatory arrangements of the professions.*

The government maintains fundamental control over self-regulatory bodies through the legislative process through which it can make, amend or repeal a statute. The government can, at any time, change the regulatory structure. Further accountability mechanisms are frequently enacted through provisions requiring open meetings, public membership on boards and committees, the duty to submit an annual report and review by the ombudsman.

The ability to review and scrutinize regulatory instruments is simply another means by which government supervises the grant of self-regulation.

The Foulkes Report discussed the general issue of accountability on page 135 to 136 and stated:

> *[M]ost jurisdictions not only insist that professional law must be public law, as passed by the legislature and reflecting public policy, but also insist that any bylaws, rules or regulations under professional statutes be reviewed by public authorities and if necessary revoked and repealed by the state. For example, since 1948 the Province of Saskatchewan has written into law the provision that any bylaws, rules or regulations passed by the governing council of a profession must be submitted to the Department of the Provincial Secretary within thirty days of being made, and that these bylaws, rules and regulations may be reviewed by the Legislative Assembly. If these supplementary regulations under the Act are found by the legislature to be beyond the power of the professional body, or to be prejudicial to the public interest, they may be revoked and repealed.*

The Foulkes report commented on the lack of a mechanism for reviewing professional rules and regulations in British Columbia on page 40, Part Two:

> *[A]lthough there can be no doubt that the legislature has the power to amend professional statutes, at present there is no effective agency able to perform a careful, continuous, and detailed review of such statutes and professional regulations.*

This led the committee to recommend the creation of a tribunal to scrutinize regulations and revoke such regulations if necessary.

A provision requiring government approval of rules or bylaws is very common in professional legislation. In addition to the *HPA*, which already applies to several professions, section 5 of the *Medical Practitioners Act* states:

> *(1) The council of the college must govern, control and administer the affairs of the college, and without limiting those powers, may make rules as follows:*
>
> ...
>
> *(4) A rule under subsection (1) has no effect until it is approved by the Lieutenant Governor in Council.*

The *Dentists Act* contains a similar provision in section 28:

> *(1) The council may make rules for the governing of the profession of dentistry, the college and registrants and for the carrying out of this Act.*
>
> *(2) No rule comes into force until approved by the Lieutenant Governor in Council.*

Section 9 of the *HPA* currently applies to the several professions governed under the *HPA* many of which have a long history of self-regulation. Virtually all health professions' rules are subject to cabinet approval.

One exception is the *Nurses (Registered) Act* (*NRA*). Under the current *NRA*, the Registered Nurses Association of British Columbia (RNABC) is granted a broad rule-making power. Under section 9, the RNABC has the power to make rules "[f]or the better administration of [the] Act," and for many specific matters, including *(a)* *"curricula and standards of schools of nursing";*

(b) *"qualifications for admission to an approved school of nursing"; and*

(c) *"registration of persons wishing to become registered nurses."*

Pursuant to section 9(5) only the rules related to licensed graduate nurses and to the curricula and standards of schools of nursing are subject to cabinet approval. Thus, at present the RNABC has a very broad, unfettered rule-making power.

The RNABC indicates its preference for the current process for rule approval under the *NRA* and its strong opposition to the *HPA* process:

> *Requiring government control over every substantive structural or process decision is the antithesis of self governance and undermines the concept of professional responsibility and accountability which is at the heart of any profession. Society does not look to professionals as a department of government, but as the repository of skills that are exercised independently of bureaucratic and political influence. A government's role must be limited to ensuring that the professions meet certain minimum standards of accountability, but that does not include "second guessing" every decision of the profession relating to its processes and standards of practice and ethics, in respect of which government has no particular expertise. It is the practising professionals themselves who are the best judge of what the practice standards should be.*
>
> ...
>
> *Having the authority to make rules is obviously in the public interest. Creating impediments to the rule making authority is not in the public interest and in the absence of evidence that the authority is being abused, it should not and need not be changed.*

The ability of cabinet to approve professional bylaws is widely recognized. As the various excerpts above indicate, all professional statutes are public statutes and represent the delegation of state powers to independent self-regulatory bodies. They are not primarily for the benefit of the professions but, rather, embody the public interest, and their provisions can have a profound impact on the public. Therefore, the Council supports a requirement for cabinet approval of professional bylaws. That said, the Council sees merit in the RNABC's submission that not every procedural or structural matter need be approved by cabinet. Many administrative and internal issues, such as voting procedures for college elections, banking and financial matters and appointment of officers can properly be dealt with in the absence of cabinet approval. Another issue raised by the professions was the considerable time it takes to receive approval of bylaws or rules. The Council will provide further details on these issues in the section, "Revisions to the *Health Professions Act*," on page 56.

2. Cabinet Rule-Making Power

There was widespread opposition to section 19(6) of the *HPA*, which provides that cabinet may make rules for a health profession. The professions contend that this power is contrary to the principle of self-regulation because it is inconsistent with the notion that expert delegates should formulate rules on professional ethics and practice standards. The professions also state that the provision is contrary to the concept of self-regulation because the Lieutenant Governor in Council should only be vested with a supervisory function in the form of his or her ability to refuse or approve rules of a health profession college.

The medical practitioners summarized the concern as follows:

> *In our respectful view, the Lieutenant Governor in Council should not be given the absolute right to impose a rule unilaterally. The concept of self-governance is that rules (and by extension, standards and ethics) are passed by peers and, accordingly, are entitled to some considerable degree of deference by the courts.*
>
> *It is our view that the strength and success of self-governance rests with the independence of the profession and to the extent it is weakened or eroded, so too is the credibility of self-governing bodies. There must of course be accountability and, in our view, this is provided for in the M.P.A. At present, section 4(2) of the M.P.A. provides that the Council of the College may make Rules with respect to any of the areas itemized in section 4(2)(a)-(k) of the M.P.A. Pursuant to s.4(5) of the M.P.A., a Rule has no effect until it is approved by the Lieutenant Governor in Council. To this extent, therefore, there is a review process in place.*
>
> *The existing M.P.A. provides adequate checks and balances in terms of its committee structure. There is one-third public representation on committees and Council. In addition, there are annual reports by the College to government and the requirement that the Lieutenant Governor in Council approve any changes to the Rules. The government retains*

> *control over amendments to the M.P.A. In addition, with respect to the College's procedures, the College is now subject to the jurisdiction of the Office of the Ombudsman.*
>
> *Given the above, it is our submission that the H.P.A. provision which gives the Lieutenant Governor in Council the power to amend the College Rules is neither required nor acceptable.*

The Council recognizes the important distinction between approval of bylaws by cabinet and by the legislature or some other independent agency. Further, the bylaw-making power set out in section 19(6) of the *HPA* is clearly a greater power than the power to review and scrutinize regulations.

Although a provision like section 19(6) of the *HPA* does not appear in any of the individual profession-specific statutes, section 19 currently applies to the several professions governed under the *HPA*, many of which have a long history of self-regulation.

A similar provision is contained in section 63 of the *Pharmacists, Pharmacy Operations and Drug Scheduling Act*. The Lieutenant Governor in Council recently exercised its powers under this section on the issue of releasing prescription information for commercial purposes. The College of Pharmacists had proposed that prescription information must not be provided to a third party for any purpose other than patient care without the fully informed, written consent of the pharmacist, patient and prescriber. The Minister's main concern was that with the release of such information under any circumstances, drug companies would be able to target sales presentations to physicians. After negotiations with the college, the Minister recommended to the Lieutenant Governor in Council that release of information for commercial purposes be prohibited. As a result, the Lieutenant Governor in Council passed a new bylaw which effectively overrode the College of Pharmacists' position.

A provision like section 19(6) of the *HPA* has been in place in Ontario for over twenty five years. Under the Ontario *Health Disciplines Act*, SO 1974, c. 47 (*HDA*), which was enacted in 1973, most of the health professions' regulation-making power was subject to ministerial review and cabinet approval. In addition, the *HDA* also gave the minister the power to review and make, amend or revoke regulations. Section 3 stated:

> *3.--(1) It is the duty of the Minister to ensure that the activities of health disciplines are effectively regulated and co-ordinated in the public interest, to have appropriate standards of practice developed and ensure that these are maintained and to ensure that the rights of individuals to*

> *the services provided by health disciplines of their choice are maintained and to these ends to,*
>
> *(c) review proposals by a Council for changes in legislation or regulations of concern to that Council;*
>
> .....
>
> *(e) request a Council to make, amend or revoke regulations respecting any of the matters specified in its applicable Part...*
>
> .....
>
> *(2) Where the Minister requests in writing that a Council make, amend or revoke a regulation under clause (1) (e) and the Council has failed to do so within sixty days after the request, the Lieutenant Governor in Council may make the regulation, amendment or revocation specified in the request.*

The successor legislation to the *HDA*, the *Regulated Health Professions Act*, RSO 1991, c.18 (*RHPA*) contains similar provisions. Section 95 of the *RHPA* contains an extensive list of a regulatory body's rule-making powers which are subject to cabinet approval. Section 5(1)(c) of the *RHPA* provides that the minister may, "require a Council to make, amend or revoke a regulation under a health profession act or the *Drug and Pharmacies Regulation Act*."

The medical practitioners refer to the Ontario case of *Szmuilowicz v. Ontario (Minister of Health)* (1995), 24 O.R. (3d) 204, Ontario Court, (General Division), Divisional Court, and submit that the case illustrates the difficulties which arise when regulations are enacted by government rather than by a self-regulating body.

In that case, the Ontario minister of health asked cabinet to pass a regulation making it an act of professional misconduct for a physician to charge a block or annual fee for all uninsured services a physician may provide to a patient. The College of Physicians and Surgeons of Ontario (CPSO) had earlier refused to make such a regulation. The CPSO challenged the regulation in court, and it was struck down.

The basis for the decision was that the government had exceeded its regulation-making power. The statutory provisions in question, though not identical to section 19(6) of the *HPA*, were very similar in that they granted the Lieutenant Governor in Council the power to make regulations which the CPSO refused to make. The court determined that the Lieutenant Governor in Council's power was not unfettered.

Rather, the power must be exercised with due regard for the purpose and intent of the statute. In *Szmuilowicz*, the court found that the government's purpose in enacting the regulation—to ensure accessibility and prevent abuses of "extra-billing"—was not consistent with the purposes of the *Medical Practitioners Act*. A key factor in the court's decision was the extensive evidence that the profession did not consider block billing to be professional misconduct.

The court discussed the limits of ministerial rule-making power and stated:

> *When the Minister sees fit to override a determination made by a self-governing body of professionals authorized by the legislature to determine such issues, the views of the self-governing body of the profession should be taken into consideration by the court in determining whether the Minister pushed the definition of "professional misconduct" beyond permissible limits, given that the term is peculiarly defined by the standards of the profession . . ..*

The court found in this case that the minister must be careful not to overstep the limits of his or her rule-making power, but the rule-making authority itself was not put in question.

The College of Physicians and Surgeons of British Columbia submits that this case illustrates the difficulties that can arise when the government attempts to define what is ethical. Clearly, the court in *Szmuilowicz* was not satisfied with the government's views on the issue of block billing, and the government was specifically rebuked for ignoring the views of the CPSO. The Council believes that the important principle to be extracted from this case is that the powers created by such a section are not unfettered but must be exercised having regard to the purpose of the statute and only after considering the regulatory body's position on the issue. In short, government cannot override a professional college's views on an issue without good reason. Thus, the case provides an important series of checks on the cabinet's rule-making power and demonstrates the court's willingness to intervene when the cabinet fails to accord appropriate deference to a professional college.

Thus, judicial review as applied in the *Szmuilowicz* case simply provides for another safeguard for the health professions, namely the courts' willingness to review the minister's discretion in making rules for a health profession college. Clearly, the minister's rule-making power is not unfettered.

While the professions recognized and accepted that the legislature has ultimate supervisory control over the professions since it can amend statutes, they felt that granting rule-making authority to the government of the day created a potential for improper political interference. The Council believes these concerns to be overstated. The Ontario government has had the rule-making power for 27 years, and the Council is aware of only one instance of its use, and that was in the *Szmuilowicz* case. There, the court overturned the ministry's attempt to impose a bylaw and set out specific limits on the rule-making power of the minister. It is important that government maintain ultimate supervisory authority over the powers it has delegated to the professions. In the Council's view, the order-in-council process required to make a rule or bylaw, along with the ability to seek judicial review of such decisions, provides a sufficient check on the exercise of governmental powers under this subsection.

3. Public Access to Register and Bylaws

The issue of public access to the college register and bylaws was considered in a number of preliminary reports. Section 22 of the *HPA* provides for open access to the register. Objections were made to this provision because present registers of health professions contain various personal information of registrants, such as home phone numbers and addresses. The Council understands the privacy concerns but is of the view that such issues can be addressed through the design and operation of the register. It is important that a regulatory body keep a publicly available and up to date record of members' names and business addresses, as well as their registration status. The Council will suggest an amendment to this provision in the section on "Revisions to the *Health Professions Act*," below.

F. THE *HEALTH PROFESSIONS ACT* BYLAWS

The *Terms of Reference* direct the Council to conduct a comparative analysis of the *HPA* with each professional statute, along with any relevant rules, regulations or bylaws, in order to ensure that they contain the *core principles* of professional regulation. The *Terms of Reference* also indicate that the *HPA* embodies those *core principles* of professional regulation which the Minister considers are desirable or essential for regulating the profession in the public interest.

In the initial phase of the review process, the Council also considered the *HPA* draft bylaws. These bylaws are distributed to newly designated professions as a guide for drafting bylaws for their new regulatory colleges. Several questions in the Council's comparative analysis referred to the draft bylaws. The Council informed the professions that although the bylaws were not legally binding, they reflected the ministry's view of provisions which were desirable for regulating a profession in the public interest.

During the review process, the original draft bylaws were substantially rewritten and many provisions were removed and some added. This complicated the Council's process as its initial questions referred to the original draft of the bylaws. The revisions also underscored the fact that the bylaws were not legally binding and subject to modification, making it somewhat difficult to assess which bylaw provisions embody *core principles* of professional regulation.

Nonetheless, many provisions appear in both versions of the draft bylaws and are also consistent with the *core principles* discussed in the *Terms of Reference*. The Council felt it important to note where provisions in the various health profession statutes could be considered inadequate, incomplete or missing having regard to the draft bylaws. The Council has decided to include its account of such provisions in this separate section in order to reflect the fact that the bylaws have a different legal status than the *HPA*.

1. Open Board and Committee Meetings

Bylaw 11(2), now bylaw 12(4) of the *HPA,* states that "...the meetings of the board must be open to registrants and to the public." Further, bylaw 12(4), now bylaw 23(3), states that "...meetings of a committee must be open to registrants and to the public."

The Council received objections to the requirement of open board, committee and panel meetings. One membership association expressed concern about telephone conferences and meetings of committees such as an education committee or a legislative and government affairs committee whose subject matters are not necessarily matters for public dissemination. Some regulatory bodies stated that keeping committee meetings open to the registrants and the public will unduly disrupt and delay the proceedings and constrain the candor of the discussion. One regulatory body submitted that openness concerns are already addressed, since the public may have copies of the minutes of its board subject to the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165. Another health profession college contended that the public is sufficiently represented through the one-third public representation on its board and disciplinary committee hearings.

The Council previously indicated its support for public disciplinary hearings on page 29 above. Similarly, the Council believes that, as a general rule, meetings of the board, the registration and inquiry committees should be open to the public subject to the exceptions set out in bylaws 12(5)(a) to (d). To the extent that other research or policy committees may be established, the Council believes that their meetings need not necessarily be open to the public.

2. Public Membership on Committees

HPA bylaws 14(2), 15(2), and 16(2), 17(2), 18(2) and 19(1) provide that the registration, discipline, inquiry, quality assurance, patient relations and executive committees must have at least one-third public membership. Most professions objected to this provision on the basis that the issues under consideration are best judged by a panel of peers and that significant delays may occur in seeking public members for panels. In the Council's view, public membership on major committees is an important public accountability measure and should be included in the professional statute.

3. Mandatory Liability Insurance

HPA bylaw 97 provides for mandatory liability insurance. Virtually all health professions agreed on the importance of this provision. However, one college suggested that the standard amount of $1 million be omitted, as different health professions require different coverage. The Council notes however that the $1 million requirement is stated as a minimum requirement for liability insurance coverage.

4. Discipline Committee Records

HPA bylaws 65 and 66 provide that the registrar must keep records of the results of all investigations of the inquiry committee and all decisions of the discipline committee. The bylaws further provide that the discipline committee must record and transcribe its hearings, that the board must publish a notice on the disciplinary proceedings and that the registrar must notify the colleges or associations responsible for the regulation of the profession in other jurisdictions if the proceeding resulted in a limitation or suspension of a registrant's practice. The only comment the Council received suggests that there should be a discretion extended to the health profession colleges not to disclose discipline decisions and records thereof in certain circumstances.

The Council accepts this suggestion but stresses that any discretion be confined to well-defined circumstances. In this regard, Schedule 2 of the *Regulated Health Professions Act* of Ontario, which is the *Health Professions Procedural Code*, sets out procedural rules applying to all health professions in Ontario. Section 56 provides for the publication of the Discipline Committee's decisions:

> *56.(1) The College shall publish a panel's decision and its reasons, or a summary of its reasons, in its annual report and may publish the decision and reasons or summary in any other publication of the College.*

> *(2) In publishing a decision and reasons or summary under subsection (1), the College shall publish the name of the member who was the subject of the proceeding if,*
>
> > *(a) the results of the proceeding may be obtained by a person from the register; or*
> >
> > *(b)the member requests the publication of his or her name.*
>
> *(4) The College shall not publish the member's name unless it is required to do so under subsection (2).*

Further, section 23(3) of the Ontario *Health Professions Procedural Code* states:

> *(3) A person may obtain, during normal business hours, the following information contained in the register:*
>
> *1. Information described in clauses (2) (a) to (c).*
>
> *2. Information described in clause (2) (d) relating to a suspension that is in effect.*
>
> *3. The results of every disciplinary and incapacity proceeding completed within six years before the time the register was prepared or last updated,*
>
> > *i. in which a member's certificate of registration was revoked or suspended or had terms, conditions or limitations imposed on it, or*
> >
> > *ii. in which a member was required to pay a fine or attend to be reprimanded or in which an order was suspended if the results of the proceeding were directed to be included in the register by a panel of the Discipline or Fitness to Practise Committee.*
>
> *3.1 For every disciplinary proceeding, completed at any time before the time the register was prepared or last updated, in which a member was found to have committed sexual abuse, as defined in clause 1 (3) (a) or (b), the results of the proceeding.....*

These provisions may serve as a blueprint for similar provisions in the *HPA* which the Council believes should distinguish between a disclosure by the Inquiry Committee and disclosure by the Discipline Committee. The Inquiry Committee is, for the most part, an investigative body, and its proceedings precede the laying of formal charges. However, decisions of the Discipline Committee should generally be available to the public.

G. CONCLUSIONS FROM COMPARATIVE ANALYSIS

In the preceding section, the Council has discussed generally the issues raised by the Council's comparative analysis of the health profession statutes. Volume II contains detailed reports for each individual profession regarding their particular statute.

The comparative analysis indicated that the professions under review fell into two distinct categories. The first group consisted of those professions whose statutes were so deficient when compared with the minimum requirements set out in the *HPA* and the *core principles* that there was little reason to consider trying to amend the statute so as to make it acceptable. These statutes are the *Optometrists Act* and the *Podiatrists Act*.

The second group consisted of professions whose statutes by and large met the standards set out in the *HPA* and the *core principles*. In some cases these statutes contained provisions that are in the public interest but are not contained in the *HPA*. These statutes are the *Chiropractors Act*, the *Dentists Act*, the Nurses *(Registered) Act* and the *Medical Practitioners Act*.

As noted above, however, the comparative analysis is only part of the legislative review process. The other concerns are the desirability of minimizing the number of statutes that govern health professions and the onus on the professions to justify the need for a separate statute. These latter concerns are addressed in the next section of this report, "Designation under the *Health Professions Act*."

IV. DESIGNATION UNDER THE *HEALTH PROFESSIONS ACT*

A. POLICY FRAMEWORK

In considering the issue of whether a profession should be designated under the *HPA*, the Council was directed to consider not only the comparative analysis but also the general policy that designation is the favoured option and that a profession must justify a continuing need for a separate statute. The Council would like to expand on this important issue.

Under the existing regulatory system, each profession is governed by its own professional statute. The terminology used, as well as the regulatory structures and processes created, vary widely from profession to profession, especially with respect to the complaints and discipline process. This variation and resulting complexity is confusing to the public and registrants. A uniform regulatory system under the *HPA* would eliminate much of the complexity and confusion and foster the development of a common jurisprudence for the health professions.

Several recent reports of royal commissions and government policy statements in several provinces have emphasized that an integrated approach to the delivery of health care is in the public interest. Co-ordination and co-operation amongst health care providers is of fundamental importance to such an approach, and a uniform regulatory structure enhances the government's ability to apply health care policy consistently.

One policy initiative for which co-ordination and consistency is particularly relevant is the scope of practice review process the Council recently completed. The ministry requested that the Council review the scopes of practice of the existing professions with a view to implementing a new regulatory framework for health professions in British Columbia. The key elements of the new framework are broad, non-exclusive scope of practice statements and narrowly defined reserved acts. Reserved acts are those elements of a profession's scope of practice which present such a significant risk of harm that they should be reserved to a particular profession that is qualified to perform them. The new system will create shared scopes of practice, and it is likely that many of the reserved acts will be shared amongst particular professions. A uniform regulatory structure would ease the implementation of the new model of professional regulation.

A general policy favouring a uniform regulatory structure was referred to in the report of the Seaton Commission on Health Care in British Columbia. The relevant excerpts from that report are set out on page 11 of this report.

The Seaton Commission concluded that the existing health professions acts be repealed and the *HPA* be revised to serve as the umbrella act for regulating health professions.

The general policy of legislative uniformity is also consistent with initiatives in several other provinces—notably Ontario, which has implemented umbrella legislation for the health professions, and Alberta, which is in the process of approving umbrella legislation. The Council agrees with these statements about the desirability of uniformity in legislation and accepts that, as a general rule, designation under the *HPA* is the preferred option. This general policy favouring designation is embodied in the *Terms of Reference* which refer to the desirability of a "high degree of consistency between statutes" and of "minimiz(ing) the number of statutes that apply to the governance of health professions." Indeed, the *Terms of Reference* and attached criteria and guidelines make it clear that the Council is to consider whether there are unique features of the profession or other relevant factors that justify a need for a separate statute.

However, the Council again emphasizes that although the policy preference is for uniform legislative structures, the *HPA* model still embodies a strong commitment to self-regulation through the "college" system of regulation.

B. THE PROFESSIONS' SUBMISSIONS

All of the health professions subject to the Council's legislative review opposed designation under the *HPA*. Most health professions voiced strong objections while a few conceded to the possibility that designation under the *HPA* and the repeal of their profession-specific statute may be beneficial to their profession. Towards the completion of the process, almost all professions appeared to accept the notion of uniform legislation and indicated that they would be willing to accept designation under the *HPA* so long as all professions come under that statute and provided that certain suggested changes were made to the *HPA*. The following are some of the objections to designation the professions raised during the review process.

1. Tradition and Jurisprudence

Some health professions argue against designation under the *HPA* by asserting a long history of regulation. One health profession feels that inclusion under an umbrella act such as the *HPA* would be "a slight on (the health profession's) individuality, uniqueness and historical right to self-regulation."

All the larger health profession colleges advance the argument that designation of their profession under the *HPA* would erase valuable existing jurisprudence about their profession. They believe the jurisprudence is evidence of a "proven track record and considerable judicial comment of weighty precedential value." One health profession opposes designation under the *HPA* by arguing that, "(n)early 100 years of innovation and evolution in the provisions ... would be lost with no appreciable advantages to the public."

Despite requests for additional information, the Council was not provided with specific examples of precedents that would be lost and the effect that would have on the colleges' processes. Further, decisions by the courts in respect of interpretation of the statute and in particular interpretation of procedural provisions, rarely assess the merits of the provisions. Rather, such decisions take the provisions as granted and simply determine whether they have been applied properly.

In sum, the Council does not believe that tradition and decades of self-regulation are adequate reasons for continuing separate health profession statutes. The Council has already explained that the *HPA* still embodies a commitment to self-regulation. Thus, there exists no such "historical right to self-regulation." Similarly, the arguments about the existing body of precedent under a health profession statute do not justify the retention of a separate statute. No submissions were presented which supported the proposition that significant judicial precedent would be rendered inapplicable and there seems no rational reason why it should.

2. Size and Complexity

Most health professions contend that the *HPA* was enacted to deal with new and emerging professions that need an initial regulatory framework. They state that the *HPA* was not meant to apply to traditional health professions with a sizable membership and a sophisticated regulatory framework that has served the public interest for many years.

While the initial focus of the *HPA* was new and emerging professions, nothing in the *HPA* restricts its application to new professions. Further, the *Terms of Reference* clearly indicate that the government is contemplating uniform legislation for the health professions, and it has directed the Council to use the *HPA* as the its template for assessing the quality of the existing professional statutes. Finally, the Seaton Commission stated on page D-30:

> *The commission recommends that ... the existing health care profession acts be repealed and a revised Health Professions Act become the umbrella act for regulating all health care professionals ....*

3. Uniqueness

The Council encountered many declarations of "uniqueness" by the health professions. One health profession claims a unique philosophy which would be lost under the *HPA,* while another lists a number of factors that make it a unique profession, including size, efficient rule-making structure and policy framework. Other health professions simply declare their uniqueness and assert that designation under the *HPA* will destroy their unique characteristics.

The Council acknowledges that each health profession is unique. However, the Council asked each health profession to explain how their uniqueness justifies the retention of separate health profession statutes. None of the health professions claiming uniqueness described specifically how such unique factors support the continuing need for a separate statute.

The only health profession that presented convincing arguments of uniqueness was emergency medicine. Emergency medical assistants (EMAs) are not self-regulated but, rather, regulated by government. Further, there is only one employer for EMAs, a government body, not a private institution. Training for EMAs is job-specific and standardized because it is provided by only one facility. Also, registration criteria are not as relevant for EMAs, as hiring and licensing takes place only to fill a vacancy. Finally, in Ontario, which has adopted umbrella legislation for health professions, ambulance services continue to function under separate legislation.

C. CONCLUSIONS

In terms of the Council's analysis of the individual statutes in light of the *core principles*, the professions fall into two distinct categories so far as the quality of their legislative schemes is concerned.

The first group consisted of professions whose statutes were so deficient when compared with the minimum requirements as set out in the *HPA* and the *core principles* that there was little reason to consider trying to amend the statute so as to make it acceptable. This group includes Optometry and Podiatry.

Therefore, the Health Professions Council recommends that the *Optometrists Act* and the *Podiatrists Act* be repealed and those professions designated under the *Health Professions Act*.

The second group consisted of professions whose statutes, by and large, met the standards set by the *HPA* and which presented valid concerns with respect to uniform legislation. These concerns were largely focused on the notion that uniform legislation which does not include all professions is not an improvement over the present regulatory model. Further, several of these statutes contain provisions that are definitely in the public interest but are not contained in the *HPA*. To simply designate these professions without making changes to the *HPA* would be contrary to the public interest. Thus, although none of the professions provided a persuasive submission that their profession was so unique as to justify a separate statute, they did present compelling reasons why, at the present time, designation under the *HPA* was not in the public interest and it would be appropriate to retain their separate statutes.

This second group includes Chiropractic, Dentistry, Medicine and Registered Nursing, all of which would have difficulties operating under the *HPA* as it currently stands. Each of them has a statute which meets the required standards of the *HPA,* and the public interest does not favour designation under the *HPA* unless various concerns with the provisions with the *HPA*, as it applies to the professions, are addressed. Those concerns are discussed in the following section of this report, "Revisions to the *Health Professions Act*," on page 54.

Therefore, the Health Professions Council recommends that the *Chiropractors Act*, the *Dentists Act*, the *Medical Practitioners Act* and the *Nurses (Registered) Act* be repealed and those professions designated under the *Health Professions Act* as soon as revisions are made to the *Health Professions Act* to reflect the unique features of those professions.

As discussed on page 51 only emergency medical assistants were able to convince the Council that the public interest is best served if they continue to be regulated under their *Health Emergency Act*. The Council was generally not persuaded that any other profession had provided sufficient rationale.

Therefore, the Health Professions Council recommends that the *Health Emergency Act* not be repealed, and the profession of emergency medical assistance not be designated under the *Health Professions Act*.

V. REVISIONS TO THE *HEALTH PROFESSIONS ACT*

Several of the Council's preliminary reports contained a separate section addressing suggested revisions to the *HPA*. For the most part, these represent either deficiencies in the *HPA* or provisions in other health profession statutes which represent an improvement of the *HPA*. The suggestions were made by several professions and represent areas in which the *HPA* should be changed in order that the present regulatory colleges may better protect the public interest. There are other areas in which changes to the *HPA* should be considered. These include changes with respect to the "reserved acts model" as described in the *Terms of Reference* and the issue of mandatory membership. Finally, the Council will also make recommendations about changes to the *Health Emergency Act*. These include changes with respect to the "reserved acts model" as described in the *Terms of Reference* and the issue of mandatory membership.

A. CRITICISMS OF THE *HEALTH PROFESSIONS ACT*

1. The Registration Process and the Registrar's Duties and Powers

Section 20(1) of the *HPA* provides that the Registration Committee is responsible for granting registration to applicants. The Council received useful criticism of this provision. The Registered Nurses Association of British Columbia (RNABC) believes its model to be more effective than the one found in the *HPA*. The RNABC utilizes three entities in the registration process: a registration committee, a membership review committee and a board of examiners. However, most applicants are registered through a simple administrative process carried out by the registrar upon satisfaction of the applicable rules. The RNABC submits that it cannot possibly review all applications by way of the *HPA* process because of the number of applicants.

Similarly, the College of Dental Surgeons of British Columbia (CDSBC) states that registration is generally an administrative task which can be handled by the registrar. The requirements for registration are explicitly set out in the *Dentists Act Rules*, and applicants who meet the requirements are registered. Only in non-standard situations is the registration committee required to deal with an application.

The Council agrees that for larger professions such as registered nursing, dentistry, psychology and medicine, a committee need not consider every application. It is evident that the criteria for registration are widely known and transparent, leaving nothing for the appropriate committees to ensure compliance with. In these circumstances, each application need not be reviewed by a registration committee.

Therefore, the Health Professions Council recommends that section 20 of the *Health Professions Act* be modified to provide for a more flexible registration process, which would allow the registration committee to delegate approval of applications to the Registrar.

2. The Complainant as a "Party" to a Disciplinary Hearing

A pressing concern amongst the health professions is section 38(2) of the *HPA* which provides that the complainant in a disciplinary matter may appear as a party. Many professions objected to this provision. For example, the College of Dental Surgeons of British Columbia states:

> *A disciplinary hearing in this regard is akin to a criminal trial. In a criminal trial the victim is not a party; the only parties are the Crown and the accused.*
>
> *That is because the Crown is the party aggrieved by the breach of the Criminal Code and the party with the obligation to enforce the Criminal Code. Those are not the roles of the victim. While it is important that the Court in criminal matters hears from the victim during sentencing as to impact, the victim should otherwise be a witness and not a party.*
>
> *The same applies to disciplinary hearings. It is the duty and obligation of self regulating professions to prosecute members who act inappropriately on behalf of the public as a whole. It is the profession that is aggrieved by a breach of the professional standards of the profession because it brings the profession into disrepute. People who complain to the College are important to that process as they initiate the investigation, but thereafter, a complainant should only be a witness to the College's disciplinary actions. There is a very real possibility that if a complainant is given party status at a disciplinary hearing their focus will not be on protection of the general public, but on their own interest. A disciplinary hearing may be used by a complainant as an examination for discovery in aid of a civil action against the member.*

The British Columbia College of Chiropractors states:

> *The purpose of appeal rights and hearings in professional regulation is to provide the member and college with the ability to address errors of law, jurisdiction, natural justice or fundamental misapprehension of evidence*

at the first instance. As a witness, the complainant is not a party to the discipline process and as such does not have any appeal rights.

The Registered Nurses Association of British Columbia, the British Columbia Nurses' Union, as well as the College of Physicians and Surgeons of British Columbia make similar comments about this issue.

The Council agrees with these submissions. Although the complainant plays an important role in the discipline process, the regulatory body is responsible for prosecuting the complaint, and a complainant should not be a "party" to the proceeding. It is important that the focus of disciplinary hearings remain professional standards and the public interest, and that the process not become a substitute for personal actions in the courts. Nonetheless, the Council believes that the *HPA* and the *core principles* indicate the importance of involving the complainant in the process. In particular, complainants should have the right to appear at disciplinary hearings.

Therefore, the Health Professions Council recommends that the *Health Professions Act* be amended to remove the right of the complainant to appear as a party.

3. Appeal Right from a Decision of the Discipline Committee

Section 40 of the *HPA* provides that any person "aggrieved or adversely affected" by a decision of a discipline committee has a right to appeal the decision. The Council agrees with the submission of the British Columbia College of Chiropractors that the term "aggrieved or adversely affected" contained in section 40 of the *HPA* may be too broad and may encompass persons who ought not to be entitled to an appeal.

Therefore, the Health Professions Council recommends that section 40 of the *Health Professions Act* be amended to restrict the right of appeal to the parties in a disciplinary hearing.

4. Cabinet Approval of Bylaws

The Council has previously discussed the issue of cabinet approval at length in the section, "Accountability Mechanisms," on page 35. After reviewing the legislation and the insightful comments by the health professions in their submissions, the Council is of the view that many matters of professional governance are routine and need not be subject to heightened scrutiny, as they do not raise issues of concern to the public. Such matters are administrative and would include voting procedures for college elections, banking and financial matters and appointment of officers.

The Seaton Commission recommended that not all rules need be approved by cabinet. In its chapter on professional regulation on page D-31 it stated the following matters need not be subject to cabinet approval:

> *i. adopting a college seal;*
> *ii. executing documents;*
> *iii. approval of banking and finance;*
> *iv. selecting committees and procedures for election to committees;*
> *v. regulating meetings of the college and its committees;*
> *vi. appointing officers and the delegation of college powers to those officers;*
> *vii. prescribing forms for internal use;*
> *viii. arranging for indemnity insurance;*
> *ix. regulating membership fees; and*
> *x. authorizing grants.*

Similarly, Ontario's *Regulated Health Professions Act* (*RHPA*) provides a useful guide in sections 94 and 95 of the Procedural Code to matters which should be subjected to additional scrutiny. Section 94 sets out the matters not requiring cabinet approval. The Council agrees that not all matters relating to a regulatory body need be subject to cabinet approval and that the report of the Seaton Commission and section 94 of the *RHPA* provides a useful guide in this regard.

Therefore, the Health Professions Council recommends that section 19 of the *Health Professions Act* be revised to create a category of matters for which cabinet approval is not necessary.

5. Delay in Rule Approval

Another issue related to section 19 of the *HPA* is delay in the rule approval process. Section 19(7) states:

> *(7) A bylaw may not be made, amended or repealed under subsection (3) or (6) unless notice of the proposed bylaw, amendment or repeal is given to the college of each health profession prescribed for the purposes of this subsection*
>
> *(a) at least 3 months before the bylaw, amendment or repeal comes into force, or*

> *(b) within a period, shorter than that set out in paragraph (a), that the minister specifies as appropriate in the circumstances.*

This is the only provision in the *HPA* that touches on the issue of the time for approval of bylaws. Many professions have expressed serious concern regarding the amount of time it takes for rules, regulations and bylaws to be approved. The Council accepts this concern. Lengthy delays inhibit regulatory bodies' ability to regulate and are not in the public interest. Some professions suggested that a provision be enacted stating that rules proposed by regulatory bodies automatically take effect within 90 days of submission, unless the government indicates, in writing, specific objections to the rules. While the Council is not prepared to recommend the adoption of such a provision, the issue of delay in bylaw approval should be addressed in some manner.

Therefore, the Health Professions Council recommends that the Minister of Health and Minister Responsible for Seniors take steps to address the issue of delay in the bylaw approval process.

6. "Professional Misconduct", "Conduct Unbecoming" and "Sexual Misconduct"

There are several references in the comparative analysis to the terms "professional misconduct" and "conduct unbecoming." Neither the *HPA* nor the current draft bylaws use the term "conduct unbecoming." However, the *HPA* refers, for example in section 33(4)(c), to professional misconduct.

In his book, *The Regulation of Professions in Canada* (Carswell, 1994), James Casey notes that both terms are well recognized in the law of professional regulation. Professional misconduct has been generally accepted to relate to conduct while actually engaged in the practice of the profession, while conduct unbecoming relates to conduct not in the course of the practice of the profession. The Council accepts that in some cases conduct occurring outside the practice of one's profession may be cause for disciplinary proceedings by a professional college. In such cases, however, the conduct must be relevant to a member's suitability to practice the profession.

Therefore, the Health Professions Council recommends that disciplinary provisions of the *Health Professions Act* be clarified to ensure that they encompass both "professional misconduct" and "conduct unbecoming."

7. Reporting and Investigation Requirement of Investigative Committee

In the course of the legislative review process, the Council has determined that the initial intake process for complaints under the *HPA* ought to be clarified. Section 33 of the *HPA* appears to provide that all complaints must be investigated.

Many professions found this requirement too onerous. One college states that it employs an intake person for all complaint matters, and this person is responsible for screening complaints. The college states that in 1995, of 133 specific concerns received, only 30 resulted in formal complaints. Another college states that it receives approximately 1400 phone complaints and 400 written complaints each year, and that it is simply not possible for a committee to fully investigate all complaints. It also states that its registrar is successful in mediating many of the complaints.

The Council agrees that a requirement that all complaints be investigated by the inquiry committee is not an effective use of a health profession college's complaints and disciplinary processes. The College of Physicians and Surgeons of British Columbia states that under the *Medical Practitioners Act*, the registrar has the power to resolve "minor" complaints.

In the Council's view, the *HPA* does not intend that the inquiry committee must conduct an investigation in all cases but intends that some matters could be resolved by the registrar. For example, the *HPA* provides that the registrar is an inspector, pursuant to section 27(2) of the *HPA*. Pursuant to section 32(2), the registrar is mandated to deliver to the inquiry committee a copy of the complaint, an assessment thereof and any recommendations for the disposition of the complaint. The *HPA* intended that the registrar would be able to deal with minor complaints summarily, and the inquiry committee would only need to conduct an investigation in cases where the registrar refers the matter to that committee. The Council agrees that a registrar or other designate can play an invaluable role in the initial handling of complaints. In short, the Council supports an enhanced role for the registrar in dealing with complaints in the first instance.

The *HPA* should be amended to clearly provide for an initial summary review process by a designated staff person such as the registrar. That person should be empowered to dismiss the complaint where the matter is beyond the mandate of the regulatory body or where the matter is trivial, frivolous or vexatious. However, the Council believes that any summary review process must provide that decisions to dismiss complaints are subject to an internal right of appeal to either the board of the health profession college or the inquiry committee.

Therefore, the Health Professions Council recommends that the *Health Professions Act* be revised to include provision for a summary review process for complaints and a related provision for an internal appeal from a dismissal of a complaint through the summary review process.

8. Written Reasons for Disciplinary Orders

Section 39(2) of the *HPA* provides that an order of the discipline committee on a hearing must be in writing and delivered to the respondent and the complainant, if any. The College of Dental Surgeons of British Columbia makes a good point about the section. It submits that a simple order is not enough and that, generally, the common law requires that reasons be provided. The Council agrees that written reasons are an important aspect of the discipline committee's function and notes the comments of Madame Justice L'Heureux-Dubé in the recent case of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817:

> *Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review. ... Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given. ...*

The Council agrees with these views.

Therefore, the Health Professions Council recommends that the *Health Professions Act* be amended to include a requirement that discipline committees issue written reasons for decisions made during disciplinary hearings.

9. Particulars of Evidence

Section 37(1)(b) of the *HPA* requires that particulars of evidence be included in the notice of citation for a disciplinary hearing.

Several professions indicated that this requirement is not practical. For example, the College of Physicians and Surgeons of British Columbia states:

> *Evidence continues to be gathered following the issuance of charges and we perceive procedural difficulties with continued amendments to the*

> *charges issued. In our view, it is appropriate for a disciplinary charge to allege the elements of the offence but not all of the evidence to be led in support of the charge. Counsel for the College are directed to give disclosure of "particulars", including witness statements, documents, etc. either concurrently with the charge or within a short period after its issuance. There is no question that the accused member is entitled to the process but rather to the legislative requirement that particulars of any evidence form part of the charge or citation.*

The Council agrees with the criticism that the requirement in section 37 of the *HPA* regarding particulars of evidence may impair the disciplinary process. However, the Council believes that it is important that the citation include a copy of the charging document. Further, this matter raises the important issue of disclosure of evidence which is not dealt with thoroughly in the *HPA*. In the Council's view, a fundamental requirement of a fair disciplinary process is that members be apprised of the evidence in support of disciplinary charges at a reasonable time prior to the hearing. Such a provision is embodied in section 42 of Ontario's *Health Professions Procedural Code* which provides:

> *(1) Evidence against a member is not admissible at a hearing of allegations against the member unless the member is given, at least ten days before the hearing,*
>
> *(a) in the case of written or documentary evidence, an opportunity to examine the evidence;*
>
> *(b) in the case of evidence of an expert, the identity of the expert and a copy of the expert's written report or, if there is no written report, a written summary of the evidence; or*
>
> *(c) in the case of evidence of a witness, the identity of the witness.*

This provision provides a good model for a similar process which should be included in the professional statute.

Therefore, the Health Professions Council recommends that the *Health Professions Act* be amended to adopt a provision similar to section 42 of Ontario's *Health Professions Procedural Code* which provides that:

(2) Evidence against a member is not admissible at a hearing of allegations against the member unless the member is given, at least ten days before the hearing,

(a) in the case of written or documentary evidence, an opportunity to examine the evidence;

(b) in the case of evidence of an expert, the identity of the expert and a copy of the expert's written report or, if there is no written report, a written summary of the evidence; or

(c) in the case of evidence of a witness, the identity of the witness.

10. Mediation and Alternative Dispute Resolution

Section 36 of the *HPA* provides for resolving disciplinary matters through the use of registrant's undertakings or upon consent. Section 33(6) empowers the inquiry committee to take measures to indirectly resolve complaints. Several professions submitted that while they strongly support the principle of resolving matters without a hearing, this section was not clear enough or broad enough in scope. The Council agrees and is of the view that the undertakings permitted should be expanded to include such matters as "the requirement to consent to a psychiatric assessment or other medical examinations, to take counseling with a psychologist or psychiatrist, to attend educational or remedial programs, etc.," and believes the *HPA* should be amended to include a wider scope for alternative dispute resolution.

Therefore, the Health Professions Council recommends that the *Health Professions Act* be revised to include specific provisions for fostering use of alternative dispute resolution, including mediation.

11. Power of Interim/Permanent Injunction

Section 52 of the *HPA* provides that a board may apply to the Supreme Court for an interim or permanent injunction to restrain a person from contravening the act, the regulation or its bylaws. The College of Physicians and Surgeons of British Columbia states that the provision creates grounds for suspicion of "turf protection" and that the provision may be seen as "self serving."

The Council agrees that the issue of enforcement, particularly in regard to performing services which should only be carried out by registered health professionals, needs to be clarified. In the Council's view, enforcement of proceedings regarding improper performance are best left to the discretion of the attorney general, as has been the practice with respect to unregistered persons practising medicine. However, the Council sees no reason not to include the power to see injunctions in professional legislation, so that the professions can seek remedies against persons contravening their rules, regulations or bylaws.

Therefore, the Health Professions Council recommends that the Attorney General be given the authority to enforce the provisions prohibiting persons from performing services which should only be done by registered health professionals.

B. REVISIONS FROM HEALTH PROFESSION-SPECIFIC STATUTES

In this section the Council reviews several sections from some of the individual statutes the adoption of which would result in significant improvements to the *HPA*.

1. Limited Registration (*Dentists Act*)

Section 26(5)(b) of the *Dentists Act* provides that the College of Dental Surgeons of British Columbia may-grant limited registration where a person is the subject of a proceeding in B.C. or elsewhere which could result in suspension or limitations on the person's licence. The College of Dental Surgeons of British Columbia points out that this provision is necessary in order to deal with persons changing jurisdictions once disciplinary proceedings against them have been commenced. This provision is an effective public safety measure and the Council recommends that it be incorporated into the *HPA*.

Therefore, the Health Professions Council recommends that the *Health Professions Act* be revised to adopt a provision similar to section 26(5)(b) of the *Dentists Act* which provides:

> ***If, after giving the applicant an opportunity to be heard, the council determines that at the time of the application an investigation, review or proceeding is taking place in this or any other jurisdiction which could result in the suspension or cancellation of the applicant's authorization to practise dentistry in that jurisdiction, the council may refuse to grant registration or grant registration for a period or subject to other terms and conditions.***

2. Registrants' Reporting Requirements (*Dentists Act* and *Medical Practitioners Act*)

Article 5.05(e) of the *Dentists Act Rules* provides that members must report to the registrar immediately if they believe a current or former registrant has committed certain specified acts, including any contravention of the *Dentists Act* or its rules. Section 63 of the *Medical Practitioners Act* creates a duty upon registrants to report other registrants. It provides:

> *(1) A registered member must report to the registrar the condition of any person registered under this Act whom the member, on reasonable grounds, believes to be suffering from a physical or mental ailment, emotional disturbance or addiction to alcohol or drugs that, in the member's opinion, if the person continues to practise medicine or surgery, might constitute a danger to the public or be contrary to the public interest.*

An earlier version of the *HPA* Bylaws contained a similar provision but it does not appear in the current version of the *HPA* Bylaws. Such a requirement is in the public interest and ought to be included in the professional statute.

Therefore, the Health Professions Council recommends that the *Health Professions Act* be revised to adopt a provision similar to article 5.05(e) of the *Dentists Act Rules* which provides:

> ***Reporting actions of registrants. Members must advise the registrar without delay if they have reasonable grounds to believe that a current or former registrant:***
>
> ***(i) has contravened the act or a rule made under it;***
>
> ***(ii) has failed to comply with a limitation, term or condition imposed under the act or the rules;***
>
> ***(iii) has been convicted in Canada or elsewhere of any offence that, if committed by a registrant, would constitute conduct unbecoming a registrant or unprofessional conduct;***
>
> ***(iv) has incompetently practised dentistry or carried out the duties and procedures delegated to him as a registrant;***
>
> ***(v) has engaged in conduct unbecoming a registrant;***

(vi) ***has engaged in unprofessional conduct;***

(vii) ***has failed to comply with an agreement that is binding on him under section 4.1(3) of the act; or***

(viii) ***is suffering from a physical ailment, emotional disturbance or an addiction to alcohol or drugs that impairs his ability to practise dentistry or carry out the duties and procedures delegated to him.***

3. Peer Assessment (*Medical Practitioners Act*)

Section 51 of the *Medical Practitioners Act* and Part XII of the *Medical Practitioners Act Rules* set out provisions for investigating the skill and knowledge of a registrant and for peer assessment of medical office practice. The Council supports the need for such processes and believes they can be an important part of a quality assurance program. However, the Council is concerned that the current process under the *Medical Practitioners Act*, and in particular section 51 of the *Medical Practitioners Act*, provide remedial jurisdiction to the College of Physicians and Surgeons of British Columbia which is essentially disciplinary in nature, without also affording sufficient procedural protection to the member under investigation. Although the Council supports the basis for this provision, there should be rules regarding the use of information gathered during such a process, as well as general procedural safeguards for the member should a regulatory college wish to proceed with disciplinary matters upon completion of such process.

Sections 79.1 to 83 of the Ontario *Health Professions Procedural Code* create a process of quality assurance under which members must participate in programs designed to evaluate their "knowledge, skill and judgment." However, section 83 provides restrictions on the use of information gathered during such process:

> *83.(1) Except as provided in this section, the Quality Assurance Committee and any assessor appointed by it shall not disclose, to any other committee, information that,*
>
> *(a) Was given by the member; or*
> *(b) Relates to the member and was obtained under section 82.*
>
> *Exception if member gave false information*
> *(2) Information described in subsection (1) may be disclosed for the purpose of showing that the member knowingly gave false information to the Quality Assurance Committee or an assessor.*

> *Referrals to Executive Committee*
> *(3) If the Quality Assurance Committee is of the opinion, based on an assessment, that a member may have committed an act of professional misconduct or may be incompetent or incapacitated, the Committee may disclose the name of the member and allegations against the member to the Executive Committee.*
>
> *Use in other Committees*
> *(4) Information that was disclosed contrary to subsection (1) shall not be used against the member to whom it relates in a proceeding before the Discipline or Fitness to Practise Committees.*

In this way, members are assured that the process, which they can be compelled to participate in, remains focussed on quality assurance and voluntary participation, and not formal disciplinary proceedings.

Therefore, the Health Professions Council recommends the adoption of a peer assessment program similar to that described in section 51 of the *Medical Practitioners Act*, but only if restrictions on use of information gathered during such a process, such as those set out in section 83(1) to 83(4) of Ontario's *Health Professions Procedural Code*, are included.

4. Stay of Penalty Pending Outcome of Appeal (*Medical Practitioners Act*)

Section 71(4) of the *Medical Practitioners Act* provides that the executive committee may stay the operation of any penalty or punishment imposed pending the outcome of an appeal. No such provision is provided for in the *HPA*. The College of Physicians and Surgeons of British Columbia argues that the discretion is exercised sparingly and never where there is any threat of danger to the public. It states:

> *The discretion to grant a stay can be used to extract agreements and undertakings from a member and to elicit commitments on early appeal dates and interim restrictions on practice which, in our view, may not otherwise be able to be imposed.*

The Council accepts that such a provision is in the public interest, particularly as it lessens the chance for lengthy court proceedings.

Therefore, the Health Professions Council recommends that the *Health Professions Act* be revised to provide a provision similar to section 71(4) of the *Medical Practitioners Act* which provides:

The executive committee may, on the terms it sees fit, stay the operation of any punishment or penalty imposed on a person appealing under this section until the outcome of the appeal, and may require the giving of reasonable security for its costs of the appeal and payment of a fine already imposed as a condition of granting the stay.

5. Special Deputy Registrar (*Medical Practitioners Act*)

The *Medical Practitioners Act* provides for the appointment of a special deputy registrar, under section 21, who is primarily responsible, under section 65, for receiving and investigating written complaints about sexual misconduct. The appointment of a special deputy registrar, whose responsibility is to recommend actions to be taken by the sexual misconduct review committee respecting complaints on sexual misconduct, is another important complaint and disciplinary process that serves the public interest and ought to be included in the professional statute.

However, the Council recognizes that, for some professions, allegations of sexual misconduct may not be the type of concern that warrants creating a new position within the regulatory body. This may be so, for example, where a profession has virtually no historical incidence of such misconduct. In these professions, the regular complaint and discipline process can be used should such a case arise. Therefore, the Council recommends that the provision should include power to exempt professions from this provision where a profession has very little historical incidence of sexual misconduct.

Therefore, the Health Professions Council recommends that the *Health Professions Act* be revised to include a provision similar to section 21 of the *Medical Practitioners Act* which provides:

Special deputy registrar
21 (1) The council must designate a person appointed under section 20 (3) as the special deputy registrar.

(2) The special deputy registrar must

(a) receive and investigate complaints of sexual misconduct made to the college;

(b) on completion of an investigation of a complaint of sexual misconduct, review the findings of the investigation and recommend the action the sexual misconduct review committee should take under section 28 (2) (d); and

(c) perform other duties as directed by the sexual misconduct review committee or the registrar.

(3) With the prior approval of the sexual misconduct review committee, the special deputy registrar may authorize an inspector to complete an investigation under this section under the supervision of the special deputy registrar.

(4) The special deputy registrar may attempt to resolve a complaint of sexual misconduct informally if the complainant consents and

(a) the circumstances warrant informal resolution of the complaint in the opinion of the special deputy registrar, or

(b) a direction has been made under section 28 (2) (d) (iii) to make the attempt.

6. Committee Legal Assistance (*Medical Practitioners Act*)

Section 67(2) of the *Medical Practitioners Act* empowers the council of the College of Physicians and Surgeons of British Columbia, the executive committee or inquiry committee to employ, at the College of Physicians and Surgeons of British Columbia's expense, legal or other assistance for the conduct of an inquiry or hearing. The Council believes that this provision is an important discretionary power which enhances the quality of the hearing process and recommends its inclusion in the *HPA*.

Therefore, the Health Professions Council recommends that the *Health Professions Act* be revised to include a provision similar to section 67(2) of the *Medical Practitioners Act* which provides:

> ***On an inquiry or hearing, the council, executive committee or inquiry committee may employ, at the college's expense, the legal or other assistance it thinks necessary or proper.***

7. Summary Membership Termination

Section 35 of the *HPA* states that the board of a college may take any action it considers appropriate to protect the public, including suspending a registrant pending an investigation or hearing by the discipline committee. Section 35 of the *HPA* does not require that any prior notice be given to the registrant. While the Council accepts that a formal hearing requirement may not be appropriate, given the nature of the power and the matters in issue regarding section 35 of the *HPA*, the Council believes that natural justice requires that a registrant be given the opportunity to respond to the allegations. The Council recognizes, however, that there may be certain extreme cases involving substantial risk to the public where the powers need to be exercised without any prior notice to the registrant. Where action is taken without notice, the registrant would, of course, still be entitled to challenge the decision through the appeal process set out in s. 35(2) of the *HPA*.

Therefore, the Health Professions Council recommends that section 35 of the *Health Professions Act* be amended to add a duty to notify a registrant as well as provide an opportunity to respond to the allegations prior to action being taken under the section, with an exception for cases involving substantial risk to the public, in which case action may be taken without prior notice to the registrant.

8. Discretionary Reinstatement (*Medical Practitioners Act*)

Under section 62 of the *Medical Practitioners Act* and rule 176 of the *Medical Practitioners Act Rules*, the College of Physicians and Surgeons of British Columbia has the discretion to grant reinstatement to a member who has been erased from the register. A previous version of the *HPA* Bylaws contained a similar provision but it does not appear in the latest version. The Council is of the view that this is a positive rule and recommends its incorporation in the *HPA*.

Therefore, the Health Professions Council recommends that the *Health Professions Act* be revised to include a provision similar to section 62 of the *Medical Practitioners Act* which provides:

> ***Reinstatement of entry in register***
> ***62 (1) If the council directs the erasure from the register of a person's name or of another entry, that person's name or entry must not be again entered on the register except by direction of the council or by order of the Supreme Court or of the Court of Appeal on an appeal.***

(2) If the council thinks fit, the council may direct the registrar to restore to the register a name or entry erased from it, with or without payment of a registration fee, and the registrar must restore it.

9. Termination or Refusal of Registration (*Medical Practitioners Act* and *Dentists Act*)

Sections 50(1) and (3) of the *Medical Practitioners Act* provide that:

> *(1) A person who has been convicted of an indictable offence by a court in British Columbia or elsewhere is not entitled to be registered and the council may erase the person's name from the register.*
>
> ...
>
> *(3) The registration of a person must not be refused and the name of a person not be erased for a conviction for a political offence or for an offence that ought not, in the council's opinion, either from the nature of the offence or from the circumstances under which it was committed, to disqualify the person from practising under the Act.*

A similar power appears in section 50 of the *Nurses (Registered) Act* which provides that a nurse's membership may be terminated summarily and without a hearing upon conviction of an indictable offence.

The Council believes that section 50 of the *Medical Practitioners Act* is a valuable measure to deal with members and/or applicants who have been convicted of indictable offences.

Therefore, the Health Professions Council recommends that the *Health Professions Act* be revised to include a provision similar to section 50 of the *Medical Practitioners Act* which provides:

> ***(1) A person who has been convicted of an indictable offence by a court in British Columbia or elsewhere is not entitled to be registered and the council may erase the person's name from the register.***
>
> ...

> ***(3) The registration of a person must not be refused and the name of a person not be erased for a conviction for a political offence or for an offence that ought not, in the council's opinion, either from the nature of the offence or from the circumstances under which it was committed, to disqualify the person from practising under the Act.***

The Council is of the view that these provisions are an important safeguard for the public and recommends that the *HPA* be amended to include this section. However, the Council believes it important that such provisions apply only to offences that are relevant to a member's suitability to practice.

C. OTHER ISSUES

1. Name of the Regulatory Body

Currently, the regulatory body for optometry and podiatry is called the "Board of Examiners." For registered nursing, the body is called the "Registered Nurses Association of British Columbia". The *HPA* embodies the traditional name for regulatory bodies, namely "college," while membership organizations are usually identified as "associations." The Council supports the need for uniform terminology.

Therefore, the Health Professions Council recommends that all regulatory bodies be called "colleges." This will require changes to the legislation governing registered nursing, optometry and podiatry.

2. Access to the Register of Members

The Council discussed above, on page 43 the requirement of public access to the register and bylaws of a college in section 22 of the *HPA*. Clearly, the purpose of providing such public access to the register is not for the disclosure of the members' private information but, rather, for the public to verify which members of a health profession are in good standing.

In some cases, however, a member of a college may not have a business address so that the register contains only the member's personal address. In Ontario, the provisions dealing with access to a college registry provide the college with the discretion not to disclose a member's address or phone number where there are reasonable grounds to believe that disclosure may jeopardize the member's safety.

Therefore, the Health Professions Council recommends that section 22 of the *Health Professions Act* be amended to provide discretion not to disclose a member's address or phone number where there are reasonable grounds to believe that disclosure may jeopardize the member's safety.

D. REVISIONS TO IMPLEMENT THE HEALTH PROFESSIONS COUNCIL'S RESERVED ACTS MODEL

In its report on the scope of practice review, the Council discussed legislative changes to the *HPA* that would need to be enacted should the government adopt the new regulatory model which is based on descriptive scope of practice statements, reserved acts and reserved titles.

The legislative changes are the enactment of: a list of reserved acts; a provision which sets out the duties of a health professional and his or her regulatory college when delegating a reserved act, a general risk of harm clause to ensure accountability for the performance of health services by unregulated providers and a provision which provides for exceptions to the general prohibition against performing reserved acts.

VI. CHANGES TO THE *HEALTH EMERGENCY ACT*

The Council concluded that the profession of emergency medical assistance should continued to be regulated under the *Health Emergency Act*. The Council does, however, have concerns regarding some provisions of the *Health Emergency Act* which relate to quality assurance mechanisms and the complaint and disciplinary process, and therefore makes the following recommendations:

Therefore, the Health Professions Council recommends that the *Health Emergency Act* be amended to include sections 16(2)(d), 16(2)(f) and bylaw 18 of the *Health Professions Act* which provide:

16(2) A college has the following objects:

(d) to establish, monitor and enforce standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice amongst registrants;

(f) to establish, for a college designated under section 12 (2) (h), a patient relations program to seek to prevent professional misconduct of a sexual nature.

Patient relations committee
18. (1) The patient relations committee is established consisting of [6] persons appointed by the board.

(2) The patient relations committee must include at least [2] public representatives, at least 1 of whom must be an appointed board member.

(3) The patient relations committee must

(a) establish and maintain procedures by which the college deals with complaints of professional misconduct of a sexual nature,
(b) monitor and periodically evaluate the operation of procedures established under paragraph (a),
(c) develop and coordinate, for the college, educational programs on professional misconduct of a sexual nature for members and the public as required,

(d) establish a patient relations program to prevent professional misconduct, including professional misconduct of a sexual nature,

(e) develop guidelines for the conduct of registrants with their patients, and

(f) provide information to the public regarding the college's complaint and disciplinary process.

(4) For the purposes of this section, "professional misconduct of a sexual nature" means

(a) sexual intercourse or other forms of physical sexual relations between the registrant and the patient,

(b) touching, of a sexual nature, of the patient by the registrant, or

(c) behaviour or remarks of a sexual nature by the registrant towards the patient;

but does not include touching, behaviour and remarks by the registrant towards the patient that are of a clinical nature appropriate to the service being provided.

Prior to the enactment of this provision, both the Emergency Health Services Commission and the Emergency Medical Assistants Licensing Board should be consulted about which body is best able to fulfill the duties required by these programs.

Therefore, the Health Professions Council recommends that the provisions in the *Health Emergency Act* dealing with the complaints and discipline process be amended to ensure that the investigative and adjudicative functions are entirely separate, and that complainants are afforded a right of internal appeal regarding dismissed complaints.

Therefore, the Health Professions Council recommends that the *Health Emergency Act* be amended to provide for a general rule that disciplinary hearings are open to the public, subject to the list of exceptions set out in bylaw 12(5)(a) to (d) of the *Health Professions Act* Bylaws.

Therefore, the Health Professions Council recommends that the following *Health Professions Act* provisions be added to the *Health Emergency Act*:

1. **section 33(4) which deals with the inquiry committee's power to take any action it considers appropriate to resolve a complaint, including mediation;**

2. **section 36 which provides that the inquiry committee may resolve complaints by way of registrants' undertakings or consents;**

3. **section 37 which describes the contents of a citation;**

4. **section 38 which sets out the procedure for a discipline committee hearing; and**

5. **section 40 which provides for an appeal by a person aggrieved or adversely affected by a decision of the discipline committee.**

VII. MANDATORY MEMBERSHIP

In June 1998, the Minister requested that the Council address an additional issue in its legislative review. The issue was whether it is in the public interest for members of a regulated health profession to be required to belong, or to pay dues, to a professional association. The Minister noted that the Ministry has generally not been supportive of mandatory membership because it denies freedom of choice and because there is no apparent public interest that would be served.

As background, the Council notes that the issue of professional promotion and self-regulation was addressed by the Seaton Commission when it recommended that, "two separate bodies be created for all regulated or licensed professions so that there is a clear separation of membership promotion functions and licensing and discipline functions." The Seaton Commission felt that without this separation the public protection function of the College would become blurred with the membership promotion function of the professional association. However the issue of mandatory membership was not specifically addressed.

In September 1998 the Council conducted a survey on the issue of mandatory membership. The Council contacted the health professions in British Columbia and the ministries of health of all other provinces and territories, as well as other professions, such as accountants, architects, engineers, lawyers, social workers and teachers. The Council received a substantial number of responses that provided various arguments supporting or opposing a requirement for mandatory membership.

The vast majority of professions surveyed indicated that there is no legislative requirement for mandatory membership in a professional association. As far as health professions in British Columbia, only the *Podiatrists Act* and the *Optometrists Act* require that practitioners belong to the professional association. In addition, registrants of the College of Dental Surgeons of British Columbia (College) are required to pay a license fee to the College, a portion of which is used to provide funding for the professional association for dentistry. The College makes a grant to the association pursuant to section 85(2) of the *Dentists Act*.

A. ADVANTAGES OF MANDATORY MEMBERSHIP

The primary argument in favour of mandatory membership was that it improves the financial viability of the association, particularly in professions with a small membership base. Several respondents felt that in the absence of a viable professional association, pressure may mount on the regulatory body to undertake the role of the association and in turn, undermine the regulatory body's role in serving the public interest. Other respondents submitted that since all members of the profession benefit from the association's activities, for example in negotiating fee agreements with government or third party payers, all members should share in its funding.

Many other submissions were made about the benefits of membership in a professional association, though these submissions did not relate directly to the issue of mandatory as opposed to voluntary membership. These included the comments that a membership association:

- enhances educational activities and promotes research ventures;
- provides a facility for continuing education, and public information dissemination;
- would be in a position to advocate in support of the economic interests of members;
- is more proactive in government/media relations than the regulatory body which must be careful and circumspect in its public statements;
- provides a vehicle for exchanging information, mentoring and educational activities;
- provides greater opportunity to inform members of legislative and legal changes relevant to their practice standards, and to receive regular information concerning findings pertaining to their area of specialty;
- may provide liability insurance for the protection of the public.

B. DISADVANTAGES OF MANDATORY MEMBERSHIP

Those who felt it undesirable to have mandatory membership argued primarily that it violates a professional's right of freedom of association under the *Charter of Rights and Freedoms*. Another common submission was that mandatory membership may result in a blurring of the respective roles of professional association (promoting professional interests) and the regulatory body (serving the public interest). Some of the other submissions opposed to mandatory membership stated that it would result in increased fees, and that confusion may arise about which professional association a member will be forced to join. Although in some professions there is clearly one dominant association, in others, there may be several groups competing for membership.

The Council accepts that professional associations can provide services that are in the public interest, such as providing continuing education programs and advocating health policies and programs. However, while it may be desirable for practitioners to belong to professional associations, it is not in the public interest to require them to do so. Making membership compulsory infringes on members' freedom of association, and has the potential to raise the perception that the activities of the regulatory body and professional association are not truly separate. The Council agrees with the views of the College of Dental Technicians of British Columbia when it states:

> *We do not feel that a college should encroach on personal freedoms. A registrant should have the freedom to choose for themselves whether an association provides the components that will make membership a pleasant and valuable experience. we also feel that as the interests of the associations are not necessarily related to licensure and competency issues, it would be inappropriate and at odds with the regulatory role, to require membership.*

Public trust and confidence in the self-regulating process is reinforced with a clear separation of the regulatory body and professional association. Further, the Council sees little distinction between mandatory membership and mandatory dues. The system described by the College of Dental Surgeons still restricts members' freedom of association since it is the College that selects the association that receives the grant. This raises the perception that the duties of the regulatory body are not entirely separate from the activities of the professional association.

After carefully considering the responses, the Council concludes that it is not in the public interest for members of a regulated health profession to be required to belong, or to pay dues, to a professional association.

Therefore, the Health Professions Council recommends the repeal of any provision in any professional statute, rule or regulation that requires members of a regulated health profession to belong, or to pay dues, to a professional association.

VIII. OVERSIGHT OF COLLEGES

One significant issue which has only recently been drawn to the attention of the Council is the necessity of some process to ensure the accountability of the regulatory colleges themselves.

The mandate of all the colleges is to regulate their separate professions in the public interest. Elsewhere in this report the Council has made recommendations regarding such matters as barriers to interdisciplinary practice. Not all the professions will agree with the approach taken by the Council. To the extent such recommendations, if enacted, are ignored, the public interest is not going to be served.

Differences may well arise between professions on a variety of issues, some of which will undoubtedly have an impact on the public interest.

The Council has concluded that some process must be put in place to deal with inter-professional complaints and to provide general oversight of the regulatory colleges' performance. This function could well fit in with the recommendations in the Scope of Practice Report for an ongoing review of the Reserved Acts List [Part I, Volume 1, Section IV.C.5(a), page 62].

Therefore, the Health Professions Council recommends a process be established by the Minister of Health and Minister Responsible for Seniors for the Health Professions Council to provide ongoing review and oversight of the regulatory colleges.

IX. FINAL WORD

The *HPA* embodies the framework for a new model of self-regulation for health professions. It recognizes the value of making more choices available to the public in determining its health care needs while at the same time ensuring that the choices are within safe parameters.

However, the new model does not apply equally to those professions which are not designated under the *HPA*. This has been the primary task of the legislative review: to determine whether it is in the public interest to bring all, some or none of the self-regulating health professions under the one umbrella statute.

The history of self-regulation has a long and generally meritorious tradition in this province, as elsewhere in Canada. It has taken the form of a statute, enacted by the legislature, enabling a regulatory body to be established for the actual governance. The regulatory body has various names—the College of Physicians and Surgeons, the Board of Examiners in Optometry—but in whatever guise, the function is essentially the same. The regulatory body is made up almost entirely of members of the profession (with lay members now mandated), and its main task is to set the entrance qualifications, standards of practice, bylaws and rules of practice and disciplinary mechanisms. In day to day practice, the members rarely have need to refer to their governing statute; the rules of their regulatory body determine what they do and how they do it.

Despite the lack of interaction between the members and their statute, certain professions have attached a significance to having their own statute, with their own professional name, which far exceeds the intended purpose. In any event, perpetuating the dual system of having some professions regulated pursuant to individual statutes and others pursuant to the *Health Professions Act*, can only entrench the impression that some professions are more recognized than others. This flies in the face of the implicit objective of eliminating the concept of a hierarchy among the professions.

While all professions proclaim support for the team approach to the provision of health care, in practice many professions complain that some professions consider themselves more equal than others.

Apart from the fact that regulation pursuant to a single universal statute has been recommended by previous studies of the delivery of health services (see the Seaton Commission report, for example), and despite the fact that it is the declared choice of government, there are other reasons:

- It is the current trend. Alberta is instituting such a plan and Ontario has had it in place for a number of years without apparent deplorable effects, at least none that have been pointed out to the Council despite invitations to those opposed to such a plan do so, while other provinces have such a system under active consideration;

- All newly recognized health professions are designated as such under the *HPA*;

- Some of the professions operating under their own statutes have requested designation under the *HPA*;

- It ensures that all self-regulated professions are subject to the same law so that judicial interpretations will apply to all;

- Most significantly, it removes the appearance that some professions are superior to others and thereby 'merit' their own statute.

During the public hearing into the scope of practice of the nursing profession, the Council was reminded of the early motto of one of the most highly regarded nursing schools in the country: "I see and I am silent." That is a sad commentary on attitudes towards a noble and humanitarian profession. Hospitals did work in those days, but to subscribe to the philosophy of "if it ain't broke don't fix it," which several professions suggested as a good reason to retain the present system, would be perpetuating the same attitudes today. The system has progressed since then, to the benefit of the public. The Council believes the recommendations in this report will continue that progression.

APPENDIX

TERMS OF REFERENCE

SCOPE OF PRACTICE / LEGISLATIVE REVIEW
OF
RECOGNIZED HEALTH PROFESSIONS
BY THE
HEALTH PROFESSIONS COUNCIL

In accordance with the authority established in section 24 of the *Health Professions Act*, the Health Professions Council is hereby directed to review the scope of practice and the legislative framework for all recognized health professions and to consider the following matters in accordance with the attached Criteria and Guidelines (Schedule A).

1. How should the existing scope of practice for the health profession be legislatively defined in order to reflect fairly and accurately the current state of practice in that field of health care and reflect the public interest in the practice of the profession?

2. Should any of the tasks or services performed by the health profession be considered "reserved acts" exclusive to that health profession (or jointly with other related professions) because of the risk of harm involved to the health, safety or well-being of the public?

2.1 Which of the reserved acts, or aspects of the reserved acts, may be performed by persons supervised by practitioners, and under what terms and conditions?

3. Do the titles reserved exclusively for the health profession adequately serve the public?

4. Would designation of the health profession under the *Health Professions Act* be in the public interest or are there unique features of the health profession, or other relevant factors, that justify a continuing need for a separate Act?

5. What amendments, if any, are required to the current Act, rules, regulations and bylaws for each profession to adequately provide for the regulation of the profession in the public interest and to ensure they contain the core principles of professional regulation reflected in the *Health Professions Act* and discussed in Schedule B?

The statutes to be examined are listed in Schedule C together with specific directions about priority reviews.

SCHEDULE A

CRITERIA AND GUIDELINES

1. **How should the existing scope of practice for the health profession be legislatively defined in order to reflect fairly and accurately the current state of practice in that field of health care and reflect the public interest in the practice of the profession?**

    - The current definition may require expansion and updating to reflect academic/scientific advancements in the practice of the profession and in related professions.

    - A concise legislative definition of the tasks and services appropriately delivered by registrants is required. This should include any limits on the scope of practice that may be necessary for public protection and may involve limits on a class or classes of registrants who have different skills and abilities than other registrants.

    - An aspect of scope of practice may be shared between two or more discrete health professions.

2. **Should any of the tasks or services performed by the health profession be considered "reserved acts" exclusive to that health profession (or jointly with other related professions), because of the risk of harm involved to the health, safety or well-being of the public?**

    - Where a reserved act is presently conferred on a health profession, the Council will determine if it is necessary to continue that exclusivity for reasons of public protection, in view of the desirability of maximizing consumer choice and limiting cost of health care services.

    - Only those tasks and services involving a significant risk of harm should be reserved exclusively for members of that health profession.

    - A reserved act may be conferred on more than one profession where the Health Professions Council is satisfied that it is an appropriate aspect of the scope of practice of each profession.

2.1 Which of the reserved acts, or aspects of the reserved acts, may be performed by persons supervised by practitioners, and under what terms and conditions.

- Although reserved acts may only be performed by certain professions, it may be appropriate for other persons to perform them, or aspects of them, under the supervision of members of those professions.

- Where the Council is satisfied that a reserved act, or an aspect of it, may be performed by another person under the supervision of a practitioner, it will recommend the terms and conditions under which it may be performed, including but not limited to,

  > whether it should only be performed by a person having certain training or qualifications,

  > whether its performance should be limited to specific locations such as a hospital, or

  > the degree of direct or indirect supervision which should be exercised.

3. Do the titles reserved exclusively for the health profession adequately serve the public?

- The reserved title must adequately serve the public in describing the practitioner and the services which are being provided.

- The title must adequately distinguish professional members from others performing similar services outside the jurisdiction of the college.

4. Would designation of the health profession under the *Health Professions Act* be in the public interest or are there unique features of the health profession, or other relevant factors, that justify a continuing need for a separate Act?

- Where the profession favours designation, and designation would be in the public interest, the Council may -- following its review of scope of practice -- forego the legislative review and recommend the form of a regulation for designation of the profession under the *Health Professions Act*.

- Where a profession expresses a preference for retention of a statute, the Council should consider these factors:
    - > Does the degree of complexity in operating the existing college make it difficult to convert to the regulatory scheme established under the *Health Professions Act*?
    - > Is more than one health profession regulated by the same college? If so, would separation of the regulatory responsibilities be desirable because of the difficulties experienced with the existing scheme?
    - > Is the current Act so flawed that it needs to be repealed and replaced or are only minor amendments required?
    - > Is it likely that a new Act for the health profession would closely resemble the *Health Professions Act*?
- A high degree of consistency between statutes is essential to reflect the minimum regulatory requirements that apply equally to all health professions.
- It would be desirable to minimize the number of statutes that apply to the governance of health professions in order to facilitate statutory amendments as required from time to time.

5. **What amendments, if any, are required to the current Act, rules, regulations, and bylaws to adequately provide for the regulation of the profession in the public interest and ensure they contain the core principles of professional regulation reflected in the *Health Professions Act* and discussed in Schedule B?**

    - The *Health Professions Act* embodies those core principles of professional regulation which the Ministry considers are desirable or essential, for a profession to be effectively regulated in the public interest.
    - The *Health Professions Act* should be considered the standard or template of professional legislation -- it sets out the relevant matters which should be included in a professions statute and provides appropriate bylaw-making authority for those which should be contained in ancillary legislation. Where membership in a professional association is compulsory, the bylaws of that association should also be considered.

- Each health profession's legislation should be compared with the *Health Professions Act*, with a view to identifying those provisions which are inadequate, incomplete or missing -- as well as those which do not serve the public interest.

- Regulation of Emergency Medical Assistants under the *Health Emergency Act* should be reviewed with particular regard to the role of the Emergency Health Services Commission and to the terms of the collective agreement.

- The review will require close scrutiny of the five essential core principles of effective professional regulation set out in Schedule B (attached).

* * *

SCHEDULE C

HEALTH PROFESSIONS STATUTES

PRIORITY ACTS:

Optometrists Act

Naturopaths Act

Dentists Act

OTHER ACTS:

Chiropractors Act

Health Emergency Act

Medical Practitioners Act

Nurses (Licensed Practical) Act *

Nurses (Registered) Act

Nurses (Registered Psychiatric) Act

Pharmacists, Pharmacy Operations and Drug Scheduling Act *

Podiatrists Act

Physiotherapists Act *

Psychologists Act

* Scope of practice review only. The *Pharmacists, Pharmacy Operations and Drug Scheduling Act* was only recently enacted (1993) and reflects the unique features of the practice of pharmacy. The *Physiotherapists Act* has been repealed in favour of the designations of physical therapy and massage therapy under the *Health Professions Act*. The *Nurses (Licensed Practical) Act* is also to be repealed in favour of the designation of licensed practical nursing under the *Health Professions Act*.

The *Dental Technicians and Denturists Act* and the *Hearing Aid Act* are not included because of applications submitted to the Health Professions Council by practitioners regulated under these Acts.

Quality assurance measures

- There should be effective mechanisms for monitoring the continuing competency of practitioners, including the ability to set mandatory continuing education requirements.
- A committee of the board should be responsible for reviewing the standards of practice and code of ethics and circulating new practice guidelines and bulletins to members.

Complaint and disciplinary processes

- The principles of administrative law, including natural justice and fairness, should be respected within the regulatory scheme for the handling and disposition of complaints.
- Penalties should be adequate to protect the public.
- Rights of appeal -- whether internal or to the courts -- of decisions following a hearing and decisions not to proceed to a hearing must be available to the complainant and the practitioner.

Accountability mechanisms

- There should be a requirement for Government approval of rules or bylaws.

SCHEDULE B

CORE PRINCIPLES

Mandate of the regulatory body

> The mandate for health professions has been defined in section 15.1 of the *Health Professions Act* (and has been replicated in each of the other profession statutes).

> Legislative provisions -- including provisions found in regulations, rules and bylaws -- which are outside of those enumerated duties and objects should serve the public interest.

> Barriers to inter-disciplinary practice are not generally in the public interest. The public interest is best served when all related health professions work together collaboratively to maximize the quality and choice of services for the consumer in any field of health care.

> Activities of a regulatory body to promote the economic, political, and professional interests of its members must not compromise the ability of the regulatory body to regulate the profession in the public interest.

Registration requirements for entry into the profession

> Principles of administrative law, including natural justice and fairness, must be reflected in the admissions criteria and application process for both new graduates of accredited educational programs and foreign-trained practitioners.

> There must be objective requirements for registration and for accreditation of education programs.

> Applicants should have appropriate rights of appeal of decisions affecting their ability to register.

REVIEW PROCESS

- It is anticipated that the scope of practice / legislative review will include a consultation process with affected stakeholders.

- The Terms of Reference and information regarding the progress of the review will be circulated in the *Health Professions Bulletin* of the Legislation and Professional Regulation Division of the Ministry.

- The Council has been requested to deal with the following three statutes first for the reasons noted:

  > *Optometrists Act* -- the profession has been asking for an expansion of its scope of practice for some time.

  > *Naturopaths Act* -- the profession has been seeking approval of a pharmacopoeia for some time and the Act requires updating.

  > *Dentists Act* -- there is a need to examine issues respecting the appropriate governance structure for the College of Dental Surgeons.

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SAFE CHOICES: A New Model for Regulating Health Professions in British Columbia

Part II, Volume 2: PRELIMINARY LEGISLATIVE REVIEW REPORTS

Irvine E. Epstein, Q.C., Chair
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PART II – VOLUME 2

PRELIMINARY LEGISLATIVE REVIEW REPORTS

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HEALTH
PROFESSIONS
COUNCIL

CHIROPRACTORS ACT
LEGISLATIVE REVIEW REPORT (PRELIMINARY)

July 1998

FOREWORD

This report is the result of the Health Professions Council's legislative review of the chiropractic profession pursuant to the Terms of Reference from the Minister of Health and Minister Responsible for Seniors. Under the Health Professions Act, the Health Professions Council is a six person advisory body appointed by the Government of British Columbia to make recommendations to the Minister of Health and Minister Responsible for Seniors about the regulation of health professions.

In this report the Health Professions Council examines two issues:

(1) whether designation of the health profession of chiropractic under the Health Professions Act would be in the public interest or whether there are unique features of the health profession, or other relevant factors, that justify a continuing need for a separate statute; and

(2) what amendments, if any, are required to the current statute, rules, regulations and bylaws for the profession of chiropractic to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the Health Professions Act and discussed in Schedule B to the Terms of Reference.

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EXECUTIVE SUMMARY

The Health Professions Council has conducted a comparative analysis of the Chiropractors Act with the Health Professions Act.

After reviewing the analysis and considering the *core principles* of professional regulation embodied in the Health Professions Act and discussed in the Terms of Reference, the Health Professions Council has determined that designation of the profession of chiropractic under the Health Professions Act would be in the public interest. In the Health Professions Council's view, the general policy favouring designation and the lack of compelling reasons justifying a separate statute support its recommendation that designation is in the public interest.

CHIROPRACTORS ACT LEGISLATIVE REVIEW REPORT (PRELIMINARY)

I. INTRODUCTION

This is the preliminary report of the legislative review of the Chiropractors Act (the CA) conducted by the Health Professions Council (the Council).

The review was conducted pursuant to the Terms of Reference issued by the Minister of Health and Minister Responsible for Seniors in accordance with section 24, now section 25 of the Health Professions Act (the HPA).[1]

The Terms of Reference direct the Council to review the governing statutes for each of ten health professions, of which chiropractic is one.

A. THE NATURE OF THE REVIEW

The purpose of the review as set out in the Terms of Reference is twofold:

(a) To determine whether designation of the health profession under the HPA would be in the public interest or whether there are unique features of the health profession, or other relevant factors, that justify a continuing need for a separate statute.

(b) To determine what amendments, if any, are required to the current statute, rules, regulations and bylaws for each profession to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference.

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[1] During the early drafting of this Report statute references were based on RSBC 1979 and Amendments. For ease of reference, the older provisions are indicated in brackets next to current citations. The current versions refer to the Health Professions Act, RSBC 1996, Chapter 183, and the Chiropractors Act, RSBC 1996, Chapter 48.

The Terms of Reference and the Criteria and Guidelines which expand upon them are included as an Appendix to this report.

The Council's primary task in conducting the legislative review is to determine whether it is in the public interest that a health profession be designated under the HPA. The analysis of whether the professional statute contains the *core principles* of professional regulation is an important element in the consideration of whether designation is in the public interest. The extent to which a professional statute currently embodies these *core principles* is clearly one of the factors the Council must consider in making this determination.

However, the *core principle* analysis is not the only factor that must be considered. The Terms of Reference reflect a general policy that designation under the HPA is the favoured option. They refer to the desirability of minimizing the number of statutes that govern the health professions and the importance of a high degree of consistency among statutes. The Terms of Reference also direct the Council to consider specifically whether there are unique features of a health profession or other relevant factors that **justify** a separate statute. Thus, the onus is on the profession to establish why a separate statute is in the public interest.

In summary, in determining whether a profession should be designated under the HPA the Council must consider, first, the extent to which the current professional statute embodies the *core principles* of professional regulation and, second, whether there are unique features about the profession or other relevant factors that justify the retention of a separate statute.

The Council would like to clarify at the outset that throughout the legislative review process it has received various submissions to the effect that designation under the HPA is tantamount to government "taking over" the professions. That is simply not the case. The HPA still relies on a system of self-regulation. Professions regulated under the HPA still have colleges, and still have a broad rule-making power. Indeed, the basic structure of the HPA is remarkably similar to the current professional statutes. Thus, while there is some difference between provisions of the HPA and the current professional statutes, the HPA clearly embodies a strong commitment to the principle of self-regulation.

B. THE PROCESS FOR THE REVIEW

The general process for the review provides for an initial meeting with the profession, preparation by the Chair of the Council of a comparative analysis of the profession's current statute with the HPA, discussion of the analysis with the profession, drafting of a preliminary report, discussion of the preliminary report within the Council, consultation meetings and a final report.

The Council Chair met with representatives of the British Columbia College of Chiropractors (the College) and the British Columbia Chiropractic Association (the Association) on April 24, 1995 to discuss the review process.

The Chair then completed the comparative analysis of the CA and the HPA, and in a letter dated April 24, 1996, provided the College and the Association with a detailed summary of the analysis of the CA. The College and the Association were asked to provide responses to a number of questions and to describe the unique features of chiropractic, or any other relevant factors, that justified the retention of a separate statute. The College thereupon provided written submissions. The Association made no submission.

The Chair then completed this preliminary report which will be circulated to all health professions and other interested parties upon request.

C. THE CHIROPRACTORS ACT

Chiropractic has been a regulated profession in British Columbia since 1934 with the enactment of the Chiropractic Act, SBC 1934, c.12. In that year, the Chiropractors' Association of B.C. was established which was renamed the British Columbia Chiropractic Association in 1970. Since 1934, numerous amendments have been made to the statute, including in 1984 the regulation of the use of the title "doctor" by chiropractors, the repeal of a provision in 1987 which authorized a nurse to practise chiropractic, the alteration of the definition of chiropractic in 1990 to include the use of devices directly related to the articulation of the human body, and most recently in 1993 pursuant to the Health Professions Statutes Amendment Act, 1993, c.50. The 1993 amendments included the present duties and objects clause, enhanced the College's inspection powers, and gave it interim suspension powers in professional disciplinary matters.

II. DISCUSSION OF ISSUES

The Council's primary focus in conducting this review is to determine whether designation of the profession of chiropractic under the HPA would be in the public interest, and a key element of this task is to determine whether the CA contains the *core principles* of professional regulation reflected in the HPA and discussed in the Terms of Reference.

The Council has determined that it would be in the public interest for the chiropractic profession to be designated under the HPA and proposes to discuss its conclusion by considering first, whether the CA contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference, and second, whether there is a need for a separate statute. The Council also intends to make some recommendations regarding possible improvements to the HPA.

A. DOES THE CHIROPRACTORS ACT CONTAIN THE *CORE PRINCIPLES* OF PROFESSIONAL REGULATION?

Schedule B to the Terms of Reference organizes the *core principles* of professional regulation under five headings. The Council proposes to discuss this issue by considering each of those headings in turn.

1. Mandate of the Regulatory Body

Schedule B of the Terms of Reference emphasizes two issues under this heading:

i. barriers to interdisciplinary practice are not in the public interest; and

ii. it is important that there be a clear separation between the professional association and the regulatory body.

Both of these points were discussed by the Seaton Commission in its report "Closer to Home". Regarding interdisciplinary practice the Commission stated:

> *In addition to broadly stated scopes of practice, there are other barriers to practice. For instance, there is no reason why a member of one profession should not be allowed to be a member of another profession. A provision in any regulation, rule, by-law or Code of Ethics which*

> *prevents this from happening is inappropriate. It may be in the profession's interest to have such a prohibition, but it is not in the public interest.*
>
> *Some of the existing professional legislation makes it an offence for a member of a college to work in association with someone who is not a member of that college. But as long as the non-member does not practice within the profession's narrow scope of practice, the commission does not believe there is any substantial reason why a member of a college should not be allowed to work in cooperation or partnership with someone who is not a member. In fact, a multi-disciplinary practice may be beneficial and should be encouraged.*

The Council agrees with these comments about interdisciplinary practice.

With respect to the relationship between the regulatory body and the professional association, the Commission recommended that two separate bodies be created for all regulated and licensed professions so that there is a clear separation of membership promotion functions and licensing and discipline functions. The Seaton Commission felt that without this separation the public protection function of the College would become blurred with the membership promotion function of the professional association.

The Seaton Commission's views echo those of an earlier report into health care entitled "Health Security for British Columbians, Special Report: Consumer Participation, Regulation of the Professions, and Decentralization" (the Foulkes Report). In a chapter on public regulation and the professions, Professor J.T. McLeod stated:

> *It is only reasonable to recognize that professions, like other groups and individuals in society, may well be expected to have certain private self-interests of their own which are not coincident with the public interest. Recognition of a degree of real or at least potential conflict between the private interest of the profession and the public interest is the root of the necessary distinction between the professional or licensing body on the one hand, whose purpose is to enforce standards of quality and service, and the voluntary association of the profession on the other hand, whose legitimate function is to advance the particular interests of the profession and its membership. This important distinction between the public function of the licensing body and the private function of the voluntary association is now widely recognized in Canada. From the standpoint of*

> *both the professions and the public, it is desirable that the separation of the two functions be kept sharp and distinct.*

The Council agrees with these comments and believes it is important that there be a clear separation between the professional association and the regulatory body.

In considering the *core principles* which relate to the mandate of the regulatory body, the Council notes the following:

1. The College readily concedes that s.21(1) [*9(1)*] of the CA creates a barrier to dual licensure but argues that it is in the public interest. Section 21(1) [*9(1)*] of the CA states:

> ***Practice***
> *21 (1) Subject to subsection (2), a person registered as a chiropractor under this Act must not engage in the practice of the diagnosis or treatment of the human body for disease, or the causes of disease, otherwise than as a chiropractor, unless the person,*
>
> > *(a) first applies to have his or her name stricken from the register of members of the college, and*
> >
> > *(b) discontinues the use of the name "chiropractor", whether by way of advertisement or in any other manner that might signify that he or she was practising as a chiropractor within the meaning of this Act.*

The College states:

> *Section 9(1) of the CA creates a barrier to dual licensure which is in the public interest. It is our understanding that certain other professions share this view and have similar rules.*
>
> *It is important that the Council understand that the College supports barriers to dual licensure, as provided in s. 9(1) of the CA, but not barriers to multi-disciplinary practices whereby chiropractors share office space with other regulated health professions, as approved by the College. Multi-disciplinary office sharing arrangements are in the public interest, provided the office sharing arrangement includes only regulated*

> *health professionals and the College maintains an active role in approving the office sharing arrangement to ensure that the chiropractor does not confuse the public as to which practitioner is providing a specific type of care . . ..*

The College also refers to its May 1996 Scope of Practice Submission in which it discusses the issue of dual licensure:

> *We agree that health professionals should be able to establish partnerships or other business associations with practitioners from a wide array of disciplines provided there are no obstacles to the effective regulation of the practitioners by their respective Colleges. In addition, barriers to multi-disciplinary practice should not be maintained if they are motivated by professional concerns.*
>
> *However, the Seaton Commission did not provide any explanation on why barriers to multi-disciplinary practice are not in the public interest. The recommendation is without any thoughtful consideration of its negative impact on professional governance and the quality of health care services.*
>
> *The Council should be extremely wary of simply embracing the Seaton Commission's blanket prohibition against multi-disciplinary practices without a thorough understanding of its effect on professional regulation and public safety. The Council must be confident that the general application of the Seaton Commission's recommendation is in the public interest and will not compromise the quality of chiropractic services and professional regulation.*

The College outlines several specific concerns it has regarding dual licensure including difficulties associated with regulating practitioners who are members of two colleges, possible double billing of the Medical Services Plan and potential uncertainty in the patient's mind regarding the nature of the treatment provided. The College also states that it is unaware of any public demand for dual licensure.

The College's main concern appears to be problems associated with disciplining persons engaged in dual practice:

> *If there is a problem with patient care by a practitioner who is a chiropractor and/or naturopath or physician, how will the respective*

> *colleges be able to determine their jurisdiction to deal with the complaint? How would the patient be able to assess to which college it should report a complaint? The practitioner's treatment plan will likely include elements from all of the professions and it may be impossible to determine which act caused the complaint and which college should assume jurisdiction. There is a risk that no college would assume jurisdiction and the professional would not be prosecuted for the alleged misconduct.*

The College has made some valid points regarding potential difficulties relating to dual licensure. However, the provision in question imposes an absolute ban on such arrangements which, in the Council's view, runs contrary to the views of the Seaton Commission, and is not in the public interest. The main policy thrust of the scope of practice review and the adoption of the reserved acts model of regulation is maximizing consumer choice within safe parameters. While the Council appreciates that dual licensure raises issues for a regulatory college, in the Council's view, an absolute ban on dual licensure is not in accordance with this principle.

In Ontario chiropractors are entitled to be members of other health professions, both regulated and unregulated, and the College of Chiropractors of Ontario has enacted a policy to address the regulatory issues.[2] The policy provides for example that:

> Dual registrants are required to inform the patient that the proposed treatment is outside the scope of practice of chiropractic and that the proposed treatment would not be administered in the registrant's capacity as a chiropractor;
>
> the client/patient must understand in what circumstances he or she is receiving treatment from the dual practitioner in his or her capacity as a chiropractor, and in what circumstances he or she is receiving treatment which is outside the scope of the practice of chiropractic.

In the Council's view, allowing dual licensure and giving the College the power to regulate the matter is more in accordance with the public interest than an outright ban. Further, the Council has not been provided with any evidence of problems with the Ontario approach.

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[2] CCO Policy: P- 018. Dual Registrants. Executive Committee, College of Chiropractors of Ontario. Approved by Council: July 29, 1995, re-affirmed by Council: November 1, 1997.

2. The Council asked the College about Rule 16.01(i) of the CA which provides that no chiropractor shall practise or share office space with another person who is not a chiropractor unless authorized by the board.

The College responds as follows:

> *The Office space rule is not a barrier to interdisciplinary practice. The rule allows chiropractors to share space with non-members of the College upon approval. In our experience, most applications for sharing office space are approved.*
>
> *It is appropriate for the College to regulate these relationships to ensure that the public interest is protected. For example, we ensure that the office space is organized so that the public will not be confused as to who is providing care. Another example relates to scope of practice issues. Chiropractors who share office space with naturopaths will not want to appear to be engaged in the sale of vitamins or other remedies which is outside the scope of chiropractic, but very much a part of naturopathy.*
>
> *The College also requires that the office sharing arrangements be between regulated health professionals so that if the patient has a problem with the care provided, the patient has an avenue of redress to the appropriate regulatory body, thereby ensuring that the public is protected from potential reoccurrences of alleged misconduct.*

The Council appreciates that a part of a regulatory college's mandate includes ensuring that the care provided by registrants in associations with other health care professionals meets the standard of practice of the profession. Therefore, the Council accepts that regulatory colleges do have some role to play in approving such arrangements. However, it is important that the criteria for granting approval does not create unnecessary barriers to interdisciplinary practice. Therefore, the Council recommends that the criteria be clearly set out in the rules governing the profession, and thus be subject to consultation and government approval.

3. The Council is concerned about the use of the term "good taste" in rule 21.03 of the CA Rules and a lack of definition thereof. Rule 21.03 states:

> *A member may, in any medium of communication, undertake or authorize any marketing activity respecting his or her chiropractic services which is factual, accurate, verifiable and in good taste.*

The College claims that such provision was formulated after and in accord with the Supreme Court of Canada decision of Rocket v. the College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232. Furthermore, the College contends that the term "good taste" does not lend itself to precise definition, similar to the term "professional misconduct".

While considering this provision the Council would like to point out the danger of attributing subjective standards to such a term, thereby potentially encroaching on a chiropractor's rights and freedoms enshrined in the Canadian Charter of Rights and Freedoms. This was precisely the cornerstone of the decision in the Rocket case. The court in Rocket stated that professional regulatory bodies may regulate advertising by their members but the restrictions should impair the right to freedom of expression as little as possible. The court provided further detail by drawing a distinction between restrictions about information on standardized products and restrictions on claims that are inherently not easy to verify. It concluded that regulations aimed at promoting professionalism and preventing irresponsible and misleading advertising on matters not susceptible of verification should clearly be permitted.

In the Council's view, the term "good taste" allows too much room for discretion and subjective judgment. In this regard, reference to the new HPA model Bylaws may be useful, where it states the following on "advertisement":

> *99. (2) Any marketing undertaken or authorized by a registrant in respect of his or her professional services must not be*
>
> *(a) false,*
>
> *(b) inaccurate,*
>
> *(c) reasonably expected to mislead the public,*
>
> *(d) unverifiable,*
>
> *(e) contrary to the best interests of the public, or*

> *(f) reasonably expected to diminish the profession's ability to provide service of the highest quality.*

This provision may serve as a blueprint for a change of wording of Rule 21.03 of the CA Rules.

4. Section 52 [*51*] of the HPA provides that a board may apply to the Supreme Court for an interim or permanent injunction to restrain a person from contravening the Act, the regulations or its bylaws. The College does not object to this HPA provision.

5. The Council asked the College about s. 24 [*23*] of the HPA which provides that the board and members acting on behalf or under the direction of the board are immune from liability for acts or omissions done in good faith, except for vicarious liability for acts or omissions. The Council notes that although the College offers no objection to the inclusion of s.24 [*23*] of the HPA into the CA, it takes exception to s.24(2) [*23(2)*] which provides:

> *(2) Subsection (1) does not absolve a college from vicarious liability for an act or omission for which it would be vicariously liable if this section were not in force.*

In the opinion of the College, the College as a separate entity should also enjoy the same immunity that is given to the board and members, college directors, officers and staff, who act in good faith on behalf or under the direction of the board. Additionally, the College cites the Disciplinary Authority Protection Act which it finds more appropriate than the HPA provisions regarding immunity for acts done in good faith.

In the Council's view section 24 [*23*] of the HPA was intended to protect individuals acting in a regulatory capacity, not regulatory bodies such as the College. In any event, the Council notes that the College would still enjoy the protection of the Disciplinary Authority Protection Act which applies to the College in its disciplinary capacity.

6. Finally, the Council asked the Board about to s.19(1)(t) [*18(1)(r)*] of the HPA which provides that a board may establish the following committees: a registration committee, a quality assurance committee, an inquiry committee, a discipline committee, a patient relations committee and other committees the board determines are necessary or advisable. The College asserts that the Board can do much of what would be delegated to the committees enumerated in the HPA provision, and objects generally to the committee structure set out under the HPA. The College states:

> *The HPA mandatory committee structure, appears to be imported from the Ontario Regulated Health Professions Act without the recognition that most health professions in B.C. do not have a comparatively large population base of registrants. Due to the relatively small size of many professions in B.C., if boards are required to delegate all regulatory functions to committees, it may create problems finding enough qualified and willing registrants to staff the committees.*

However, rather than being mandatory as stated by the College, this section is discretionary. While it lists several committees, the only mandatory committees under the HPA are the inquiry, discipline and registration committees. In the Council's view, establishing these committees is not an onerous task for a regulatory body charged with protecting the public interest. The Council will make further comments regarding the committee structure in the sections on registration requirements for entry into the profession and the complaint and disciplinary process.

2. Registration Requirements for Entry into the Profession

Schedule B to the Terms of Reference makes three important points under this heading. First, natural justice and fairness must be reflected in the admission criteria and application process for newly graduated and foreign trained applicants. Second, there must be objective requirements for registration and accreditation of education programs. Third, applicants should have appropriate rights of appeal affecting registration decisions. In considering this heading, the Council had some concerns regarding the registration process.

1. The Council asked the College about section 7 [*5*] of the CA and Division 15 of the CA Rules, which provide that the responsibility for registration is divided between the Board and the Board of Examiners. Under the CA, the Examining Board is a specialized body which determines technical competence, while the Board has the final say on whether an applicant is granted a license to practice. In contrast, under the HPA, the registration committee is responsible for granting registration to applicants who meet the registration requirements. The College believes that the decision to grant a license should not be delegated to a committee as provided in s. 20(1) and (2) [*19(1)* and *(2)*] of the HPA. In short, the College prefers the registration structure under the CA.

The Council considers the general process for registration under both the CA and the HPA to be substantially similar: the powers under the CA could be followed were the profession of chiropractic to be designated under the HPA. The Council will address this matter further under the heading "Improvements to the Health Professions Act".

2 One of the *core principles* is that there must be objective requirements for registration. The Council notes that the terms "integrity and good moral character" as used in s.10(5) [*7(4)*] of the CA are not defined nor explained. The College states that its Board assesses integrity and good character on common sense criteria. The Council is concerned that those terms might violate the above *core principle* if a purely discretionary standard is exercised. However, the Council notes that terms such as "integrity" and "good moral character" appear in many professional regulatory statutes and appear to be widely accepted. Thus, while the criteria employed by the Board are acceptable, the Council would like to emphasize that the discretion created by such a provision must be exercised with the utmost fairness.

3. The College is of the opinion that the appeal procedure outlined in s.40 [*39*] of the HPA is redundant as the process for appeals is already provided for in Rule 49 of the Supreme Court Rules (the SCR). However, the Council notes that Rule 49 of the SCR expressly provides that the rule shall apply "*to the extent that it is not inconsistent with any procedure provided for in the enactment*", thus allowing the enactment - in this case the CA - to override the rule. Further, the procedure outlined in the HPA is more detailed, providing for time limits for filing the appeal and notice to affected parties, and describing the process of the hearing and the court's powers therein. No such details are present in Rule 49 of the SCR. Again, the absence of a provision such as s.40 [*39*] of the HPA may well violate the *core principle* of providing for appropriate rights of appeal affecting registration decisions.

3. Quality Assurance Mechanisms

Under this heading, Schedule B of the Terms of Reference states that there should be effective mechanisms for monitoring practitioner competency including the ability to set continuing education requirements, and a committee of the board should be responsible for reviewing standards of practice and codes of ethics.

In response, the College notes that it has a Standards of Practice Committee that investigates and researches standards of practice issues and reports to the Board. The College also notes that it has established an extensive written protocol for several misconduct complaints. The College notes that its Board is largely responsible for all quality assurance functions. The Council again notes that the HPA does not unnecessarily require that separate committees be established for these matters, as s.19(1)(t) [*18(1)(r)*] which provides for the establishment of committees is discretionary.

The Council concludes that the College has indicated substantial compliance with this *core principle*.

4. Complaint and Disciplinary Process

A review of the HPA and the principles outlined in schedule B to the Terms of Reference indicates that a designated health profession's complaints and discipline process must, at a minimum, incorporate certain key elements:

i. the investigative and adjudicative bodies must be made up of different people and the bodies administered independently;

ii. dissatisfied complainants and registrants must be afforded rights of appeal;

iii. the process must be consistent with the rules of natural justice, and provide for proper notice of a proceeding and a right to be heard; and

iv. the process must not be complex: complainants and registrants must understand how the process works.

The Council had several concerns regarding the complaints and discipline process provided for in the CA:

1. The Council asked the College about the general disciplinary process under the CA which provides that the discipline committee investigates complaints while the Board is in charge of conducting the hearings. In contrast, part III of the HPA sets out a different process for dealing with complaints in which the inquiry committee is responsible for investigating complaints and a discipline committee conducts the hearings. The College argues that its current system works well and is similar to the HPA process. While the College supports the idea of a consistent complaint and disciplinary process, it is not supportive of the HPA model.

In the Council's view, the basic structure under the HPA, and in particular separate committees for investigation and discipline hearings, is preferable to the powers under the CA. Having the Board conduct all disciplinary hearings, as is the case under the CA, creates the potential for overlap between the investigative and disciplinary functions. In this regard, the Council notes that under the CA Rules the Board is involved in the investigative phase in that it can initiate investigations, has the power to adjourn investigations, and the power to suspend registrants pending disciplinary hearings. Further, in its response to the Council the College indicates that a complainant dissatisfied with a decision of the Discipline Committee could request a review by the Board. In the Council's view, this involvement in the investigative phase underscores the problems created by the failure to establish a separate discipline committee.

Further, the Council notes that section 7(1)(e)(i) [*5(1)(e)(i)*] of the CA provides that the Board may make rules "*creating discretionary powers related to the discipline and control of currently or formerly registered chiropractors*". The College argues that this section is in the public interest because it provides efficiency and economy in complaint management, and allows the Board to control and modify disciplinary powers in response to developments in professional regulation. The College states that it has acted pursuant to this section by creating Divisions 12, 13 and 16 of the CA Rules which set out the College's complaint and disciplinary process.

The Council considers the Board's rule-making power as stated in s.7(1)(e)(i) [*5(1)(e)(i)*] of the CA is too broad, gives the Board too much discretionary power regarding the complaint and disciplinary process. In particular, it empowers the Board to set out the entire framework for processing complaints. In the Council's view, it is important that the basic framework for processing complaints be set out in the professional statute and not be left up to the discretion of the college board.

2. The Council asked the College whether it provides parties to an investigation with the procedural safeguards as enumerated in s.33(3) and (4) [*32(3) and (4)*] and bylaw 45 now bylaw 61(2) of the HPA. The College has no objection to the provisions but comments that listing procedural safeguards in a protocol or leaving them to a common law assessment of administrative fairness allows for more flexibility, thus resulting in greater efficiency.

While the Council appreciates the need for flexibility in investigatory processes, the parties subject to an investigation are entitled to know the basic minimum procedures of an investigation. The *core principles* indicate that the process must be consistent with the rules of natural justice and fairness. In the Council's view, the procedures set out in the HPA are basic minimum standards found in a complaint and disciplinary process and are far from onerous to apply in practice.

3. The Council asked the College about sections 34(1) and (2) [*33(1)* and *(2)*] of the HPA which provide that the inquiry committee must report to the board in all cases where it decides not to refer the matter to the discipline committee, and that the

complainant is entitled to a right to appeal such decision to the board. Section 33(1) [*32(1)*] of the HPA also provides that all complaints shall be investigated.

The College states that all complaints are investigated, that all complaints - with the exception of sexual misconduct complaints - are within the discretion of the discipline committee as to whether or not it should report to the Board on the dismissal, and that a complainant who is dissatisfied with the a decision by the discipline committee would have to request a review by the Board.

In the Council's view, the College makes no substantial objection to the mandatory process of the inquiry committee to report to the Board in all cases where it decides not to refer the matter to the discipline committee. Clearly, an internal right of appeal would be inconsistent with the present structure under the CA, as the Board is responsible for disciplinary hearings. In the Council's view, this further underscores the difficulty with the lack of a separate discipline committee.

4. The Council asked about s. 36 [*35*] of the HPA which empowers the inquiry committee to take measures to informally resolve complaints. The equivalent procedure in the CA, under Rule 12.04(b) of the CA Rules, does not require the consent of the member. The College states:

> *Section 35 of the HPA operates only with the consent of the member. Under the CA procedure, the Discipline Committee (which is the equivalent of the inquiry committee) has the power to reprimand and require certain undertakings without consent, provided the member is given an opportunity to be heard in a summary manner. As already stated in paragraph 4, this is a far more efficient and effective way to deal with a number of less serious complaints. We see no reason to allow the member to drive the time and expense of a full hearing process for less serious complaints in circumstances where the inquiry committee can conclude the matter with a reprimand or undertaking. There has to be some balancing of the competing interests and in this respect the balance struck in the HPA is not appropriate.*

The Council disagrees with the College. The Board or the Discipline Committee's power to impose disciplinary measures on a member after a summary hearing is an extremely serious power. The member's profession and livelihood as well as his or her reputation are at stake in this scenario. In the Council's view, a member is entitled to expect significant procedural fairness prior to disciplinary action being imposed, and the possibility that such action may be taken under the CA after a "summary" hearing and without the member's consent is not in accordance with the *core principles* of professional regulation. Further, with regard to the College's concern about members controlling the complaint process, the Council notes that under section 39(1)(g) [*38(1)(f)*] of the HPA the Discipline Committee has the power to assess costs against a respondent to a hearing. In the Council's view, this power is sufficient to control abuses of the procedures by registrants.

5. The Council inquired about section 38 [*37*] of the HPA which deals with the procedure for the discipline committee, including the right of the respondent, the college and the complainant to appear as parties and be represented by counsel and full rights of examination and calling evidence in defence and reply. The College finds this section unnecessary as it believes that natural justice and administrative fairness work and can be provided without codification.

The Council believes that important issues such as the basic structure of the disciplinary process should be included in the professional statute.

The Council will address the College's concern with the complainant appearing as a party at a disciplinary hearing under the heading "Improvements to the Health Professions Act".

6. The Council inquired about rights of appeal regarding disciplinary decisions as set out in section 40(8) [*39(8)*] of the HPA. The College strongly objects to the nature of an appeal under section 40 [*39*] of the HPA which it feels gives the scrutinizing court too much scope to intervene. It contends that the Judicial Review Procedure Act provides all the protection a member or complainant should require. The College states:

> *In our opinion, there is no public interest need for any appeal right beyond that which is currently available in the context of the Judicial Review Procedure Act which provides all the protection the member or the complainant should require. It covers:*
>
> - *jurisdiction/authority*
> - *natural justice or administrative fairness*
> - *error of law*
> - *fundamental misapprehension of evidence*
>
> *Apart from dealing with these issues, it is our opinion that the court should not be involved in conducting new hearings or in reviewing the evidence from any substantive perspective. It defeats the purpose of self-*

> *regulation of the professions if the right of appeal allows the court to substitute its views of the evidence for that of the administrative tribunal.*

The Council considers the level of scrutiny of a reviewing court to be a significant issue. The scope of intervention of a reviewing court under the Judicial Review Procedure Act is very limited. Section 40 [*39*] of the HPA must be considered the Ministry's view as to the appropriate scope of judicial review for, as noted, the Terms of Reference indicate that the HPA embodies the *core principles* of professional regulation, including section 40 [*39*] which provides for appeals of disciplinary decisions. Thus, the level of scrutiny of a reviewing court is a *core principle* which is properly contained in the professional statute. In any event, the case law regarding appeals from administrative bodies, particularly from professional regulatory colleges, indicates that courts do apply a level of deference no matter what the statute says. In this regard, in the case of Pezim v. B.C. Securities Commission, [1994] 2 S.C.R. 557, the Supreme Court of Canada ruled that certain specialized tribunals will receive deference even in the face of a right of appeal where the matter falls within their specialized expertise.

7. The College offers no substantial objection to the following matters raised in the Council's preliminary analysis:

i. The College agrees that r.16.01(f) of the CA Rules can be removed. This relates to the prohibition for chiropractors to engage in any other profession or business which, in the opinion of the Board, would be subversive of the best interests of the profession of chiropractic.

ii. The College offers no objection to incorporating s.33(6) [*32(4)*] of the HPA into the CA. This provision deals with the power of the inquiry committee to take no further action if the complaint is trivial, frivolous or vexatious or made in bad faith; or, relates to conduct or competence that is found to be satisfactory.

iii. The College also agrees to the inclusion of s.37(4) [*36(4)*] of the HPA which provides that the inquiry committee or board may direct the register to cancel a citation issued under s.37 [*36*] if either body subsequently determines that a hearing by the disciplinary committee is not required.

iv. The College accepts s. 37 [*36*] of the HPA which describes the contents of a citation (the notice of hearing for the discipline committee) and which outlines in more detail the procedures for a disciplinary hearing.

v. Likewise, the College agrees to s.39(2) [*38(2)*] of the HPA which provides that an order of the discipline committee shall be in writing and be delivered to the respondent and the complainant.

vi. The College agrees with sections 13 and 51 [*13 and 50*] of the HPA which make it an offence for a registrant to violate his or her terms of registration.

vii. The College agrees with sections 31 [*30*] and 51 [*50*] of the HPA which make it an offence to obstruct an inspector in the lawful performance of his or her duties.

viii. Lastly, the College offers no objection to the inclusion into the CA of section 51(3) [*50(3)*] of the HPA which prohibits prosecution of offences after two years.

5. Accountability Mechanisms

1. Schedule B to the Terms of Reference states under this heading that there should be a requirement for government approval of rules or bylaws. Such a provision is embodied in section 19(5) [*18(5)*] of the HPA which provides that the Minister may request a board to amend or repeal an existing bylaw or make a new bylaw for the college if the Minister is satisfied that this is necessary or advisable. Section 19(6) [*18(6)*] of the HPA provides that where a board does not comply with a request under section 19(5) [*18(5)*], the Lieutenant Governor in Council may amend or repeal the existing bylaw for the College or make the new bylaw for the College.

The College objects to the inclusion of such provisions in the CA. It submits that section 19(5) [*18(5)*] is contrary to the original concept of self-regulation because the Lieutenant Governor in Council (LGC) should only be vested with a supervisory function in the form of his or her ability to refuse or approve rules of a health profession college. Otherwise, the College argues, the Legislature may just as well delegate all of the rule-making power to the LGC in the first instance.

The Council disagrees. It is well established that self-regulation is a privilege not a right. Government grants a profession certain rights, such as the exclusive right to use a title or perform certain services, in return for which the profession agrees to regulate the profession in the public interest. As the Seaton Commission stated:

> *The purpose of regulating members of a profession is to protect the public from preventable harm. The privilege of self-regulation is granted*

> *to a profession by the provincial legislature. It is a social contract between the profession and the public. It is the property of the public the profession claims to serve.*
>
> *Self government is simply a delegation by the state of its regulatory authority in the professional sphere.*

The nature of the relationship between self regulatory bodies and the state was also addressed in the Foulkes Report:

> *Thus it is clear that the principle of state primacy over professional decisions has been understood and established over a considerable period of time. In this manner it has been established that the state has not only a continuing and lively interest in the regulation of professions, but that the state has merely delegated to the professions the power of self-government as long as that power is exercised in a manner consistent with the public interest. The state has not abdicated its ultimate authority, but has established the primacy of public legislation over the private regulatory arrangements of the professions.*

The power of professional self-regulation has been a right traditionally enjoyed by the professions, but it is a qualified right delegated by the state only so far as that delegation of authority satisfies the criteria of protecting the public interest, and no further.

The government maintains fundamental control through the legislative process through which it can make, amend or repeal a statute. The government can, at any time, change the regulatory structure. Further, accountability mechanisms are frequently enacted through provisions requiring open meetings, public membership on boards and committees, the duty to submit an annual report, and review by the Ombudsman.

The ability to review and scrutinize regulatory instruments is, in the Council's view, simply another means by which government supervises the grant of self-regulation.

The Foulkes Report discussed the general issue of accountability and stated:

> *[M]ost jurisdictions not only insist that professional law must be public law, as passed by the legislature and reflecting public policy, but also insist that any by-laws, rules or regulations under professional statutes be reviewed by public authorities and if necessary revoked and repealed*

> *by the state. For example, since 1948 the Province of Saskatchewan has written into law the provision that any by-laws, rules or regulations passed by the governing council of a profession must be submitted to the Department of the Provincial Secretary within thirty days of being made, and that these by-laws, rules and regulations may be reviewed by the Legislative Assembly. If these supplementary regulations under the Act are found by the legislature to be beyond the power of the professional body, or to be prejudicial to the public interest, they may be revoked and repealed.*

The Foulkes report commented on the lack of a mechanism for reviewing professional rules and regulations in British Columbia:

> *[A]lthough there can be no doubt that the legislature has the power to amend professional statutes, at present there is no effective agency able to perform a careful, continuous, and detailed review of such statutes and professional regulations.*

This led the Committee to recommend the creation of a tribunal to scrutinize regulations and that the body be granted the power to revoke such regulations if necessary.

Nonetheless, the Council recognizes the important distinction between approval of bylaws by the Lieutenant Governor in Council and by the Legislature or some other independent agency. Clearly, this distinction is also important to the bylaw making power set out in section 19(6) [*18(6)*] of the HPA. The Council has received important submissions highlighting the significance of this distinction, and will be considering this issue further. However, for the purposes of this preliminary report, the Council will be treating the present section 19(6) [*18(6)*] as indicative of a *core principle* of professional regulation.

The Council further notes that although a provision like section 19(6) [*18(6)*] of the HPA does not appear in any of the statutes related to the traditional professions, section 19 [*18*] currently applies to the several professions governed under the HPA, many of which have a long history of self-regulation.

Under the Ontario Health Disciplines Act (HDA) which was enacted in 1973, most of the health professions' rule making power was subject to Ministerial review and Cabinet approval. In addition, the HDA also gave the Minister the power to review and make, amend or revoke regulations. Section 3 stated:

> *3.--(1) It is the duty of the Minister to ensure that the activities of health disciplines are effectively regulated and co-ordinated in the public interest, to have appropriate standards of practice developed and ensure that these are maintained and to ensure that the rights of individuals to the services provided by health disciplines of their choice are maintained and to these ends to,*
>
> *(c) review proposals by a Council for changes in legislation or regulations of concern to that Council;*
>
> .....
>
> *(e) request a Council to make, amend or revoke regulations respecting any of the matters specified in its applicable Part...*
>
> .....
>
> *(2) Where the Minister requests in writing that a Council make, amend or revoke a regulation under clause (1) (e) and the Council has failed to do so within sixty days after the request, the Lieutenant Governor in Council may make the regulation, amendment or revocation specified in the request.*

The successor legislation to the HDA, the Regulated Health Professions Act, 1991 (RHPA) contains similar provisions. Section 95 of the RHPA contains an extensive list of a regulatory body's rule making powers which are subject to Cabinet approval. Section 5(1)(c) of the RHPA provides that the Minister may,

> *require a Council to make, amend or revoke a regulation under a health profession act or the Drug and Pharmacies Regulation Act.*

Section 5(3) and (4) provide:

> *(3) If the Minister requires a Council to make, amend, or revoke a regulation under clause (1)(c) and the Council does not do so within sixty days, the Lieutenant Governor in Council may make, amend or revoke the regulation.*

> *(4) Subsection (3) does not give the Lieutenant Governor in Council authority to do anything that the Council does not have authority to do so.*

In short, in the Council's view section 19 [*18*] of the HPA is entirely consistent with the principles of self-regulation, the practice in other jurisdictions and indeed with the practice of other health professions in British Columbia. Section 19 [*18*] is not a challenge to professional self-regulation nor does it undermine the principle of self-regulation. Rather, it is simply another accountability mechanism which underscores the notion that self-regulation is a privilege, not a right.

In the course of reviewing the legislation of other health professions, the Council was persuaded that certain improvements could be made to the bylaw approval process in section 18 [*19*] of the HPA. First, the Council is of the view that the Minister should ensure that the rule approval process does not result in inordinate delay, and suggests that the Minister explore methods to ensure rules are approved in a timely fashion. Second, the Council feels that not all rules should be subject to Lieutenant Governor in Council approval. Sections 94 and 95 of Ontario's RHPA Procedural Code provide a useful guide to the matters which should be subjected to additional scrutiny. The Council would welcome further submissions on this important point.

2. The Council notes the College does not object to section 22 [*21*] of the HPA which provides that the register and bylaws of the college must be open to inspection by any person.

6. The Health Professions Act Bylaws

The Terms of Reference direct the Council to conduct a comparative analysis of the HPA with each professional statute, along with any relevant rules, regulations or bylaws, in order to ensure that they contain the *core principles* of professional regulation. The Terms of Reference also indicate that the HPA embodies those *core principles* of professional regulation which the Minister considers are desirable or essential for regulating the profession in the public interest.

In the initial phase of the review process, the Council also considered the HPA draft Bylaws. These bylaws are distributed to newly designated professions as a guide for drafting bylaws for their new regulatory colleges. Several questions in the Council's comparative analysis referred to the draft Bylaws. The Council informed the professions that although the bylaws were not legally binding, they reflected the

Ministry's view of provisions which were desirable for regulating a profession in the public interest.

During the review process, the original draft Bylaws were substantially rewritten, and many provisions were removed and some added. This complicated the Council's process as its initial questions referred to the original draft of the bylaws. The revisions also underscored the fact that the bylaws were not legally binding, and subject to modification, making it somewhat difficult to assess which bylaw provisions embody *core principles* of professional regulation.

Nonetheless, many provisions appear in both versions of the draft Bylaws, and are also consistent with the *core principles* discussed in the Terms of Reference. The Council felt it important to note where provisions in the CA could be considered inadequate, incomplete or missing having regard to the draft Bylaws. The Council has decided to include its account of such provisions in this separate section in order to reflect the fact that the bylaws have a different legal status than the HPA.
In its review of the CA, the Council notes the following:

1. The College does not object to incorporating bylaw 39(5)(b), now bylaw 54(3) of the HPA into the CA. This provision allows an applicant three opportunities to take the examinations.

2. The College also has no objection to including a provision in the CA, such as bylaw 15(3) now bylaw 64(1) of the HPA, to the effect that the investigative and judicial functions be kept separate.

3. The Council asked the College whether it conducts mediation proceedings to resolve complaints, as set out in section 33(6)(b) [*32(4)(b)*] and bylaw 44, now bylaw 63 of the HPA. The College states its mediation proceedings must be approved by the Board but the mediation follows no formal procedure. The College objects to including a provision like bylaw 44, now bylaw 63 of the HPA in the CA without amendments that would address the Board's role in approving the mediation results.

The Council sees no obstacle in allowing the Board to approve mediation results if a provision like bylaw 44, now bylaw 63 of the HPA is incorporated into the CA. What is important is that the essence of mediation, which is to provide for an informal and non-adversarial atmosphere to resolve a complaint, is preserved.

4. The College agrees that bylaw 46, now bylaw 66 of the HPA be incorporated into the CA. This provision provides that the board must keep records of the results

of all investigations of the inquiry committee and all decisions of the discipline committee. It further mandates the board to publish a notice where disciplinary proceedings result in limitations or suspension of a registrant's practise. Also, the College has no objections to bylaws 49(1)(c), (d) and (e), now bylaws 44(b) and (d) which provide that the registrar must provide details of restrictions or suspensions of a registrant's practise upon inquiry.

5. Original draft bylaws 11(2) and 12(4), now bylaws 12(4) and 23(3), provide that meetings of the board of the college as well as all committee meetings must be open to the public. These provisions also create a discretion to close meetings in certain circumstances. The College submits that keeping the committee meetings open to the registrants and the public would constrain the candour of discussion. Further, the College claims that the public is sufficiently represented through the one-third public representation on the Board and at disciplinary hearings. The Council believes that meetings of the College board as well as the registration, inquiry and discipline committee should generally be open to the public, subject to a discretion to exclude the public in certain circumstances.

6. Bylaws 13, 14 and 15, now bylaws 14(2), 15(2) and 16(2) of the HPA provide for public representatives on the college committees. The College supports the need for public representation on the board and the discipline committee but objects to these provisions with respect to all other committees, arguing that the health profession colleges should be given some flexibility on this matter. The Council disagrees. The mechanism of public representation in all committees of health profession colleges is an important accountability.

7. Finally, the College agrees to the inclusion of bylaw 28, now bylaw 32 of the HPA which requires the board to appoint a chartered accountant as an auditor of the financial statements of a college.

7. General Conclusions from Comparative Analysis

After a careful review of the CA and the CA Rules, the Council is of the view that the legislation regarding the profession of chiropractic is for the most part consistent with the *core principles* of professional regulation. However, on some important issues, notably those related to the complaints and discipline process and the mandate of the regulatory body, the Council found several provisions to be inadequate, incomplete or missing having regard to the *core principles* embodied in the HPA and discussed in the Terms of Reference.

B. IS THERE A NEED FOR A SEPARATE ACT?

The Council proposes to address this issue by discussing the general policy favouring designation and the profession specific arguments regarding designation.

1. The General Policy Favouring Designation

As stated in the introduction to this report, the Terms of Reference reflect a general policy that designation is the favoured option, and that a profession must **justify** a continuing need for a separate statute. The Council would like to expand on this important issue.

Under the existing regulatory system, each profession is governed by its own professional statute. The terminology used as well as the regulatory structures and processes created vary widely from profession to profession, especially with respect to the complaints and discipline process. This variation and resulting complexity is confusing to the public and registrants. In the Council's view, a uniform regulatory system under the HPA would eliminate much of the complexity and confusion, and foster the development of a common jurisprudence for the health professions.

Several recent reports of Royal Commissions and government policy statements in several provinces have emphasized that an integrated approach to the delivery of health care is in the public interest. Coordination and cooperation amongst health care providers is of fundamental importance to such an approach, and in the Council's view, a uniform regulatory structure enhances the government's ability to apply health care policy consistently.

One policy initiative for which coordination and consistency is particularly relevant is the scope of practice review process the Council is currently conducting. The Ministry has requested that the Council review the scopes of practice of the existing professions with a view to implementing a new regulatory framework for health professions in British Columbia. The key elements of the new framework are broad, non-exclusive scope of practice statements and narrowly defined reserved acts. Reserved acts are those elements of a profession's scope of practice which present such a significant risk of harm that they should be reserved to a particular profession that is qualified to perform them. The new system will create shared scopes of practice, and it is likely that many of the reserved acts will be shared amongst particular professions. In the Council's view, a uniform regulatory structure would ease the implementation of the new model of professional regulation.

A general policy favouring a uniform regulatory structure was referred to in the report of the Seaton Commission on Health Care in BC. The following excerpts are from that part of the Commission's report which deals with regulation of the health professions:

> *There is a lack of consistency among the 16 provincial acts that govern the health care professions, despite the fact that all of the colleges established under the acts have the same legislative mandate: to protect the public from preventable harm. Such inconsistency increases the likelihood of variations in judicial interpretations of the acts. Underlying this situation are persistent jurisdictional disputes and a distinct lack of cooperation among the health care professions.*
>
> ...
>
> *In general, a lack of consistency characterizes the acts with respect to complaints, discipline and appeals, resulting in insufficient public accountability, no uniformity in the structure or organization of the different statutes, and an absence of common terms.*
>
> ...
>
> *The Health Professions Act has the potential to influence significantly the future of self regulation of health care professions. Under this new Act, the Health Professions Council can make recommendations to the minister concerning which groups should be granted self-regulation status, their titles, and the extent of their scopes of practice, if any. The Act could be used to create uniform legislative procedures.*

These views led the Commission to conclude that the existing health professions acts be repealed and the HPA be revised to serve as the umbrella act for regulating health professions.

The general policy of legislative uniformity is also consistent with initiatives in several other provinces, notably Ontario which has implemented umbrella legislation for the health professions and Alberta which is in the process of enacting umbrella legislation.

The Council agrees with these statements about the desirability of uniformity in legislation and accepts that, as a general rule, designation under the HPA is the preferred option. This general policy favouring designation is embodied in the Terms of Reference which refer to the desirability of a "high degree of consistency between statutes" and of "minimiz[ing] the number of statutes that apply to the governance of health professions". Indeed, the Terms of Reference and attached criteria and guidelines make it clear that the Council is to consider whether there are unique features of the profession or other relevant factors that justify a need for a separate statute.

However, the Council again emphasizes that although the policy preference is for uniform legislative structures, the HPA model still embodies a strong commitment to self-regulation through the "college" system of regulation.

With this in mind, the Council proposes to now review the arguments presented by the College which it believes **justify** the continuing need for a separate statute.

2. The Profession Specific Arguments Regarding Designation

In response to the Council's question on the designation of the profession of chiropractic under the HPA, the College states:

> *The chiropractic profession supports the goal of consistency in the regulation of health professions in British Columbia. However, the B.C. College of Chiropractors (the "College") does not support the designation of the chiropractic profession under the current Health Professions Act ("HPA").*
>
> *The HPA establishes a minimum standard of professional regulation. After considerable analysis, the College concluded that the HPA lacks many important features of professional regulation that are present under the Chiropractors Act ("CA"). The HPA makes a number of significant changes to the governance of health professions that do not serve the public interest or the interest of professional regulation.*
>
> *In order for chiropractors to support the designation of all professions under the HPA, substantial amendments would have to be made to the HPA. The requisite amendments and deficiencies in the HPA are outlined directly below...*

The College goes on to outline what it considers several deficiencies in the HPA. Many of them relate to provisions from the earlier version of the model bylaws which have been changed. Some, however, relate to current HPA provisions:

- *The Lieutenant Governor in Council should not have the power to amend college rules unilaterally as provided in s.18(5) of the HPA;*

. . .

- *Contrary to s.35(2) of the HPA, the Inquiry Committee should be able to informally resolve minor complaints without the registrant's consent;*

- *The HPA committee model delegates more authority to committees than is necessary, thereby effectively usurping the function of the college boards. The number of committees and the number of registrants that must sit on the committees under the HPA restricts a college board's ability to effectively govern the profession and does not acknowledge the unnecessary expense and impracticabilities of applying this governance structure in British Columbia;*

. . .

- *Contrary to the procedures for mediation outlined under bylaw 44 of the HPA, a college board should be involved in approving any mediation result;*

- *Public hearings will deter many complainants from pursuing their complaints and significantly hamper a college's ability to effectively manage its discipline process;*

. . .

- *The appeal rights and process in s.39 of the HPA are significantly flawed;*

- *Public access to board and committee meetings, as required under bylaw 1(2) of the HPA, would significantly constrain the college's ability to efficiently and effectively fulfil its regulatory duties;*

- *The requirement in s.18(6.1) of the HPA that any proposed amendments to college bylaws must be circulated to each college of each health profession is overly bureaucratic and procedurally*

> *cumbersome. It will undoubtedly result in substantial delays in regulatory efficiency.*

The College also notes that in response to the Council's comparative analysis, it provided further comment regarding these matters.

In its *core principle* analysis, the Council considered the points raised by the College. On several issues, the Council tends to agree with the College that the HPA was deficient in some respects. The Council has included a summary of such matters in a section of its report entitled "Improvements to the Health Professions Act". However, the Council notes that on other issues it found that it cannot agree with the College's characterization as "deficiencies" of certain key aspects of the HPA. An account of all of these issues is contained within the Council's *core principle* analysis set out earlier in this report.

However, other than specific issues raised regarding various provisions of the HPA the College makes no submissions as to why the profession of chiropractic requires a separate statute. Indeed, it appears that the College supports uniform regulation, just not under the HPA.

In summary, the Council is of the view that the College has not presented any significant reasons which justify the continuing need for a separate statute.

C. THE COUNCIL'S CONCLUSION REGARDING DESIGNATION

As noted in the introduction to this report, in determining whether a profession should be designated under the HPA the Council must balance the extent to which the present professional statute embodies the *core principles* of professional regulation and whether there are unique features about the profession or other relevant factors that justify the continuing need for a separate statute.

In considering this matter, the Council believes that although the legislation regarding chiropractic is for the most part consistent with the *core principles* of professional regulation, the general policy favouring designation tilts the balance in favour of designation under the HPA since, in the Council's view, the arguments regarding the need for a separate statute are not persuasive.

D. IMPROVEMENTS TO THE HEALTH PROFESSIONS ACT

In the course of its review of the CA, the Council has determined that there are several matters upon which the HPA could be improved to provide for the regulation of larger professions. These include the following:

1. As stated above, the College points out that registration under the CA is shared between the Board and the Board of Examiners. It argues that the Board of Examiners is highly specialized and handles only the technical competence aspect of registration. The ultimate responsibility for granting a license rests with the full Board. The Council agrees that for professions such as chiropractic, in which there are set mechanisms and bodies in place to handle the registration process in a competent manner or where there are very few applications for registration received, a registration committee may not need to be established. In this regard, the Council notes that s.19(1)(t) [*18(1)(r)*] of the HPA which provides for the establishment of committees, including a registration committee, is discretionary. However, in the Council's view, some confusion may arise, as the terms of s. 20 [*19*] provide that a registration committee is responsible for granting registration in the college. In the Council's view, s. 20 [*19*] of the HPA should be modified to read "*a registration committee established under this Act ...*".

With respect to the programs administered by what would otherwise be the patient relations or quality assurance committees, while ideally a separate committee should be responsible for such matters, the Council believes that it may be appropriate for a college board to handle such matters, particularly where the profession is small and does not have sufficient resources to staff such committees. The Council recommends that when designating a profession under the HPA, the Minister be sensitive to the size and resources of a profession when considering which committees must be established.

2. The College objects to section 38 [*37*] of the HPA which states that a complainant may appear as a party at a hearing of the discipline committee. The College states:

> *The purpose of appeal rights and hearings in professional regulation is to provide the member and college with the ability to address errors of law, jurisdiction, natural justice or fundamental misapprehension of evidence at the first instance. As a witness, the complainant is not a party to the discipline process and as such does not have any appeal rights.*

The Council generally agrees with these submissions. Obviously, the complainant is a crucial part of the discipline process but in the Council's view, the regulatory body is responsible for prosecuting the complaint on behalf of the public and a complainant should not be made a "party" to the proceeding. Nonetheless, the Council believes that the HPA and the *core principles* indicate the importance of involving the complainant in the process. In particular the *core principles* state that appropriate rights of appeal should be available to both members and complainants. In the Council's view, the complainant should be given the right to appear at the disciplinary hearing and a right of appeal, but the HPA should be amended to remove the right of the complainant to appear as a "party".

3. Although the Council rejects the notion put forward by the College that the Judicial Review Procedure Act contains the essential procedural protections for an appellant which would then render the enumeration of such rights under s. 40 [*39*] of the HPA moot, it agrees that the term "aggrieved or adversely affected" may be too broad. Thus, the Council suggests that more specific wording should be applied so as to clearly show which party is granted an appeal right from a decision of the discipline committee.

The Council expects that further improvements to the HPA will come to its attention as it proceeds through the review process for each of the existing professions. The Minister has asked that the Council's final report deal with all professions, and the Council intends to include in the report a comprehensive list of suggested improvements to the HPA.

III. RECOMMENDATION

The Health Professions Council recommends to the Minister of Health and Minister Responsible for Seniors that the Chiropractors Act be repealed and the chiropractic profession be designated under the Health Professions Act.

Appendix: The Terms of Reference and the Criteria and Guidelines.

For the Appendix *Terms of Reference and Guidelines*, please refer to the Appendix in Part II, Volume 1 – Legislative Review

HEALTH
PROFESSIONS
COUNCIL

DENTISTS ACT LEGISLATIVE REVIEW REPORT

(PRELIMINARY)

March 1998

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DENTISTS ACT LEGISLATIVE REVIEW REPORT (PRELIMINARY)

A. Introduction

This is the preliminary report of the legislative review of the Dentists Act (the DA) conducted by the Health Professions Council (the Council).

The review was conducted pursuant to the Terms of Reference issued by the Minister of Health and Minister Responsible for Seniors in accordance with section 24, now section 25 of the Health Professions Act (the HPA).*

The Terms of Reference direct the Council to review the governing statutes for each of ten health professions, of which dentistry is one.

The Nature of the Review

The purpose of the review as set out in the Terms of Reference is twofold:

(a) To determine whether designation of the health profession under the HPA would be in the public interest or whether there are unique features of the health profession, or other relevant factors, that justify a continuing need for a separate statute.

(b) To determine what amendments, if any, are required to the current statute, rules, regulations and bylaws for each profession to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference.

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*During the early drafting of this Report statute references were based on RSBC 1979 and Amendments. For ease of reference, the current provisions are indicated in brackets next to the old citations. The current versions refer to the Health Professions Act, RSBC 1996, Chapter 183, and the Dentists Act, RSBC 1996, Chapter 94.

The Terms of Reference and the Criteria and Guidelines which expand upon them are included as an Appendix to this report.

The Council's primary task in conducting the legislative review is to determine whether it is in the public interest that a health profession be designated under the HPA. The analysis of whether the professional statute contains the *core principles* of professional regulation is an important element in the consideration of whether designation is in the public interest. The extent to which a professional statute currently embodies these *core principles* is clearly one of the factors the Council must consider in making this determination.

However, the *core principle* analysis is not the only factor that must be considered. The Terms of Reference reflect a general policy that designation under the HPA is the favoured option. They refer to the desirability of minimizing the number of statutes that govern the health professions and the importance of a high degree of consistency among statutes. The Terms of Reference also direct the Council to consider specifically whether there are unique features of a health profession or other relevant factors that justify a separate statute. Thus, the onus is on the profession to establish why a separate statute is in the public interest.

In summary, in determining whether a profession should be designated under the HPA the Council must consider, first, the extent to which the current professional statute embodies the *core principles* of professional regulation and, second, whether there are unique features about the profession or other relevant factors that justify the retention of a separate statute.

The Council would like to clarify at the outset that throughout the legislative review process it has received various submissions to the effect that designation under the HPA is tantamount to government "taking over" the professions. That is simply not the case. The HPA still relies on a system of self-regulation. Professions regulated under the HPA still have colleges, and still have a broad rule-making power. Indeed, the basic structure of the HPA is remarkably similar to the current professional statutes. Thus, while there is some difference between provisions of the HPA and the current professional statutes, the HPA clearly embodies a strong commitment to the principle of self-regulation.

The Process for the Review

The general process for the review provides for an initial meeting with the profession, preparation by the Chair of the Council of a comparative analysis of the profession's current statute with the HPA, discussion of the analysis with the profession, drafting of a preliminary report, discussion of the preliminary report within the Council, consultation meetings and a final report.

The Council Chair met with representatives of the College of Dental Surgeons of BC (the College) and the BC Federation of Dental Societies (the Federation) on April 26, 1996 to discuss the review process.

The Chair then completed the comparative analysis of the DA and the HPA, and in a letter dated February 26, 1997, provided the College and the Federation with a detailed summary of the analysis of the DA. The Federation and the College were asked to provide responses to a number of questions and to describe the unique features of dentistry, or any other relevant factors, that justified the retention of a separate statute. Both groups provided written submissions.

On August 26, 1997, the Chair met with representatives of the College and the Federation, and the College then submitted a further response in an attempt to narrow the issues.

The Chair then completed this preliminary report which will be circulated to all health professions and other interested parties upon request.

The Dentists Act

The first provincial enactment regarding dentistry was An Act to Regulate the Practice of Dentistry in the Province of British Columbia, S.B.C. 1886, Chapter 7. It established a Board of Examiners to maintain a register of registrants, and to make rules, regulations and by-laws to regulate the practice of dentistry. In 1908, the Dentistry Act, 1908, Chapter 2, was passed. It established the College of Dental Surgeons of British Columbia as the body charged with the responsibility of regulating the practice of dentistry in B.C. Since that time numerous amendments have been made to the statute, most recently in 1993 pursuant to the Health Professions Statutes Amendment Act, 1993, Chapter 50. The 1993 amendments included the present duties and objects clause, enhanced the College's inspection powers, and gave it interim suspension powers in professional disciplinary matters.

B. Executive Summary

The Health Professions Council has conducted a comparative analysis of the DA with the HPA.

After reviewing the responses to the analysis and considering the *core principles* of professional regulation embodied in the HPA and discussed in the Terms of Reference, the Council has determined on the basis of its review thus far that designation of the profession of dentistry under the HPA would be in the public interest. In the Council's view, the general policy favouring designation and the lack of sufficient reasons justifying a separate statute support its recommendation that designation is in the public interest.

C. Discussion of Issues

The Council's primary focus in conducting this review is to determine whether designation of the profession of dentistry under the HPA would be in the public interest, and a key element of this task is to determine whether the DA contains the *core principles* of professional regulation reflected in the HPA and discussed in the Terms of Reference.

The Council proposes to discuss its conclusions that it would be in the public interest to designate dentistry under the HPA by first considering whether the DA contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference, and then considering whether there is a need for a separate statute. The Council also intends to make some recommendations regarding possible improvements to the HPA.

(1) DOES THE DENTISTS ACT CONTAIN THE *CORE PRINCIPLES* OF PROFESSIONAL REGULATION?

The Council compared the DA and the Rules and bylaws made pursuant to the DA with the HPA, and prepared a detailed list of questions which was sent to the College and the Federation. The College provided detailed responses to all of the questions. The Federation answered only questions referring to it and indicated its agreement with the College on the remaining questions. The foregoing analysis is the result of the Council's review of these responses.

Schedule B to the Terms of Reference organizes the *core principles* of professional regulation under five headings. The Council proposes to discuss this issue by considering each of those headings in turn.

(a) Mandate of the Regulatory Body

Schedule B of the Terms of Reference emphasizes two issues under this heading:

- barriers to interdisciplinary practice are not in the public interest; and
- it is important that there be a clear separation between the professional association and the regulatory body.

Both of these points were discussed by the Seaton Commission in its report "Closer to Home". Regarding interdisciplinary practice the Commission stated:

> In addition to broadly stated scopes of practice, there are other barriers to practice. For instance, there is no reason why a member of one profession should not be allowed to be a member of another profession. A provision in any regulation, rule, by-law or Code of Ethics which prevents this from happening is inappropriate. It may be in the profession's interest to have such a prohibition, but it is not in the public interest.
>
> Some of the existing professional legislation makes it an offence for a member of a college to work in association with someone who is not a member of that college. But as long as the non-member does not practice within the profession's narrow scope of practice, the commission does not believe there is any substantial reason why a member of a college should not be allowed to work in cooperation or partnership with someone who is not a member. In fact, a multi-disciplinary practice may be beneficial and should be encouraged.

With respect to the relationship between the regulatory body and the professional association, the Commission recommended that two separate bodies be created for all regulated and licensed professions so that there is a clear separation of membership promotion functions and licensing and discipline functions. The Seaton Commission felt that without this separation the public protection function of the College would become blurred with the membership promotion function of the professional association.

The Seaton Commission's views echo those of an earlier Report into health care entitled "Health Security for British Columbians, Special Report: Consumer Participation, Regulation of the Professions, and Decentralization" (the Foulkes Report). In a chapter on public regulation and the professions, Professor J.T. McLeod stated:

> It is only reasonable to recognize that professions, like other groups and individuals in society, may well be expected to have certain private self-interests of their own which are not coincident with the public interest. Recognition of a degree of real or at least potential conflict between the private interest of the profession and the public interest is the root of the necessary distinction

> between the professional or licensing body on the one hand, whose purpose is to enforce standards of quality and service, and the voluntary association of the profession on the other hand, whose legitimate function is to advance the particular interests of the profession and its membership. This important distinction between the public function of the licensing body and the private function of the voluntary association is now widely recognized in Canada. From the standpoint of both the professions and the public, it is desirable that the separation of the two functions be kept sharp and distinct.

The Council agrees with these comments. Barriers to interdisciplinary practice are not in the public interest, and it is important that there be a clear separation between the professional association and the regulatory body.

Before commenting on specific provisions in the DA regarding mandate of the regulatory body, the Council would like to discuss briefly some developments which took place during its review of the DA.

First, the dental profession is currently undertaking a review of regulatory and professional service functions within the profession. Prior to 1991, the College was responsible for both regulatory and professional matters. The Seaton Commission criticized this dual mandate of the College. As a result, in 1993 the Federation was incorporated under the Society Act to deal with the economic aspects of dentistry. However, concerns were expressed by members of the profession about the new organizational structure. These concerns included the College's continued involvement in member services and the perception that the Federation was overly influenced by the College. As a result of these and other concerns, in 1997 the College struck a "Task Force on the Future Structure of Organized Dentistry in BC" to review the various structures in dentistry.

The Task Force has issued two reports, both of which recommend changes to the structure of dentistry. In a recent letter to the Council, the College stated:

> As you know, on November 28, 1997, the College's council will consider a series of motions to create [new member services organizations (NMSOs)] for dentists and for certified dental assistants in British Columbia. If these motions are approved, the College's internal organizational structure will be altered. It is anticipated that staff in the College's member service division will be migrated to the new organizations. The College's role would

> become strictly regulatory for dentists and certified dental assistants, limited to matters set out in the *Dentists Act* and Rules. We refer you to the first task force, which we have already provided, and the second task force report, copy enclosed, for further details about what is envisioned. We do believe that the anticipated separation of the member service and regulatory functions of the College address several of your concerns about the College's ability to regulate the profession in the public interest.

In a follow up letter dated January 2, 1998, the College stated:

> I wanted to let you know that any concern the HPC may have in this area about the CDSBC will probably be alleviated by now. On November 28, 1997, the CDSBC's council passed a motion to establish a new member services organization (NMSO) for dentists and a second organization to provide member services to certified dental assistants. The CDSBC's role will be strictly regulatory. While a number of steps are necessary to get the NMSOs up and running, a process is currently in place to expedite the formation of these new entities.

The Council agrees that the reorganization will likely address several of the concerns noted in its preliminary analysis. However, our Terms of Reference directed us to examine the existing legislation, and the Council therefore intends to set out its concerns about the existing legislation in this report. The Council's comments regarding "Mandate of the Regulatory Body" should, however, be considered in light of the recent initiatives within the profession of dentistry, which are aimed at addressing these concerns.

In light of these comments the Council notes the following:

1. The Council is not satisfied that there is a "sharp and distinct" separation between the Federation and the College. Section 24 [*24(1)*] of the Federation's bylaws provides that 6 of its directors are appointed by the College. In addition, section 83(2)(b) [*85(2)(b)*] of the DA provides that the Council may make grants in aid of a college or association, and the majority of the Federation's funding comes from the College.

In their original submission, the College and Federation both submit that the public interest is not compromised as a result of their relationship. They state that the requirement for College representation in the Federation enhances the public interest as it injects a public interest element into what would otherwise be a purely professional association. The Federation states that its members could conceivably vote to decrease the size of its Board by eliminating the College's directors. The Federation concedes, however, that the present funding arrangement leaves open the perception that the College is not operating at arm's length.

In the Council's view, the provision for College appointed directors is inconsistent with a clear separation between the regulatory college and the professional association. While the Council appreciates the need for communication and cooperation between the Federation and the College, it believes that such close ties between the two bodies are not in the public interest.

Further, as the Council has noted, both the College and the Federation appear to have recognized the various shortcomings of the present organizational structure of dentistry.

In particular, the Council notes that its conclusion is consistent with the views of the recently completed Task Force Report on the Future Structure of Organized Dentistry in BC. The Report identified the appointment of six directors by the College to the Federation Board as a major concern. It also indicates that on December 13, 1996, the Council of the College approved that the six directors would be replaced, as their term expires, by the Federation's own representatives.

2. In its submission, the Federation states that the present funding arrangement, whereby it receives its funding through a discretionary grant from the College, leaves open the perception that the College and Federation are not truly separate bodies. To address this issue, the Federation requests that the College collect Federation fees in accordance with a Rand Formula. Under such a system, although membership in the Federation would be voluntary, all College registrants would be required to pay Federation dues. In a recent letter to the Council, the College indicates its support for a new funding arrangement.

The Seaton Commission recommended just such a funding arrangement for the British Columbia Medical Association. Although arrangements for funding membership programs and activities are not within the Council's mandate, it sees no objection in principle to the proposal. The Council believes that such an arrangement would be an improvement over the present scheme in that it would result in a clearer separation of the two organizations. However, in light of the Task Force Report, the Council believes that before such a proposal is implemented the whole issue of membership support functions and their funding should be subject to wide consultation within the profession.

3. The Council is concerned about the College's involvement in fee related matters as reflected in several provisions in the DA:

- Section 3(b) [*5(b)*] provides that the College may enter into agreements with governments or other bodies that provide prepaid or insured dentistry programs for the purpose of processing claims for payment of services rendered.
- Section 3(c) [*5(c)*] provides that the College may provide fee guides for services rendered by registrants.
- Section 4.1(2) [*8(1)*] provides that the College council may enter into agreements with the government of Canada or the Province or any other person respecting fees paid for dental services rendered.
- Article 5.06(h) [*5.06(h)(iv)*] of the DA Rules provides for limitations on the methods of compensation and contract practices of members.

In its original submission, the College states that its involvement in fee related matters enhances the public interest. It provides specific reasons for its involvement, such as the necessity of arranging for prepaid dental plans and government funded programs. In addition, the College notes that its role includes policing billing practices. In a recent letter to the Council, the College indicated that it was effectively withdrawing its objection to the Council's comments on this issue. However, as noted, the Council intends to state its views on these provisions, based on the existing sections of the DA.

The Council is not satisfied that the College's involvement in fee related matters is in the public interest. The Council believes that the professional association is the appropriate body to carry out fee related functions. In the Council's view, a professional statute should not contain provisions permitting a regulatory body to be involved in suggesting fees for its members' services or negotiating fee agreements.

In any event, in their original submissions both the College and Federation indicate that the Federation was created to take over fee related matters previously handled by the College. Both bodies also state that the College is no longer involved in producing fee guides. The Task Force Report states that:

> [t]he philosophy of the College has been termed a dual mandate - to protect the public interest and to promote the dentists' interest. In 1991, the Seaton Commission criticized part of this mandate. The Seaton Commission Report expressed concern about a perceived conflict of interest where one organization administered the *Dentists Act*, negotiated for and set fees, and conducted other activities related to the economic interests of dentists. The College agreed and in October 1993 incorporated the BC Federation of Dental Societies under the *Society Act* to deal with the economic aspects of dentistry.
>
> ...
>
> The Federation promotes the economic interests of dentists in BC. It develops the general practitioners' and specialists' fee guides and negotiates fee schedules with governments.

The Council also notes that section 2 of the Federation's constitution provides that its purposes include preparing and distributing general practitioner and specialist fee guides and negotiating fee schedules with government bodies on behalf of registrants.

Having said this, the Council appreciates that the College requires the power to approve of certain specified fee arrangements contained in Article 5.06(h) [*5.06(h)(iv)*] of the DA Rules. Article 5.06(h) [*5.06(h)(iv)*] prohibits various improper billing practices, such as receiving commissions. The College states that the power to approve of certain agreements is intended to allow for public interest exceptions to the general prohibition. It notes that this provision has been used in the past to approve of dental clinics in under serviced areas.

4. The Council is concerned about section 65 [*68(1)*] of the DA which provides that "no person other than the college shall carry on a school, college or institution for training or imparting instructions in any branch of dentistry...." without the consent of the College Council or executive committee. In its initial submission the College contends that this provision is in the public interest since the College is responsible for the delivery of dental care to the public and for quality assurance, and therefore it must have responsibility for ensuring proper educational programs. The College recently withdrew its objections to the

Council's comments regarding this issue. As noted, however, the Council intends to state its conclusions based on the existing legislation.

In the Council's view, the notion that "dentists represent the delivery of dental care" overstates the College's role which is to regulate the practice of dentistry. Although the College is knowledgeable about dentistry and can be a valuable and indeed primary resource in designing dental programs, and although it may be appropriate for the College to set admission requirements for entry to the profession and to have input on curriculum development, giving it the power to approve schools in any branch of dentistry is more than the public interest in quality assurance requires. This is particularly so given that the broad definition of dentistry would extend this power to cover programs in respect of auxiliary dentistry professions.

5. In its comparative analysis the Council asked a question about whether the DA or its Rules contained any barriers to interdisciplinary practice. In response, the College states that no such barriers exist, provided that the Rules regarding delegation of dental services to auxiliary professions are adhered to. This is a reference to Article 10 which is entitled "Auxiliary Bodies".

Article 10 contains provisions governing the relationship between dentists and related dental professions, including dental hygienists. The College accepts that since dental hygienists have been granted self-regulating status under the HPA, the Article must be re-written to remove unnecessary references to that profession. The Council also believes that this Article has the potential to impose barriers to entry if it unnecessarily limits the services auxiliary professions can perform or the circumstances under which they can perform them. Therefore, the Council believes it important that government carefully review any proposed rules on this issue prior to approving them, and include as part of its review consultations with the affected professions.

The Council also notes that Article 12 of the DA Rules, which deals with prosthetic appliances, contains provisions concerning the fitting or insertion of such devices by persons other than dentists. Such provisions create barriers for denturists which are inconsistent with the Council's recent recommendations regarding denturism. Thus, the Council recommends that the Ministry ensure that the legislation governing dentistry is consistent with those recommendations.

(b) Registration Requirements for Entry into the Profession

Schedule B to the Terms of Reference makes three important points under this heading. First, natural justice and fairness must be reflected in the admission criteria and application process for newly graduated and foreign trained applicants. Second, there must be objective requirements for registration and accreditation of education programs. Third, applicants should have appropriate rights of appeal affecting registration decisions.

In considering this issue, the Council is satisfied that the process set out in the DA, for the most part, satisfied the *core principles*. However, the Council has some concerns regarding the registration process.

1. The Council requested clarification from the College and the Federation regarding various registration criteria set out in the DA. For example, section 24 [*27*] of the DA requires that registrants be of "good character". The Council notes that "good character" does not appear in the HPA but it is included in the current draft HPA bylaws [*HPA Bylaws 47(1)(d)*]. Further, section 22(5)(d) [*26(5)(d)*] of the DA provides that the College may grant limited registration if a person has been convicted of an offence which would constitute unprofessional conduct or "conduct unbecoming". The term "conduct unbecoming" does not appear in the HPA.

The College submits that both of these provisions are in the public interest as they ensure that only persons of good character are registered with the College. The Council's concern about these provisions is that they may violate one of the *core principles* discussed under registration requirements - namely that requirements for registration must be objective. The difficulty with terms such as "good character" and "conduct unbecoming" is that they inject a significant degree of discretion into the decision making process. Nonetheless, after considering the submissions of the College and the Federation, the Council recognizes the need for such provisions and is satisfied that they do not violate the *core principles* of professional regulation. Indeed, the Council takes note of the fact that notions such as "good character" and "conduct unbecoming" are well established in many other professional regulatory statutes. Of course, it is essential that the discretionary power afforded the College through the use of these terms be exercised with utmost consistency and fairness.

2. The Council has some concern about the scope of judicial review of registration decisions. Under section 54(3) [*55(4)*] of the DA an appeal will rarely be a trial de novo while under section 19(3) [*20(4)*] of the HPA a new

hearing is more likely, though far from automatic. The College objected strongly to the nature of an appeal under section 19 [*20*] of the HPA which it felt gave the scrutinizing court too much scope to intervene.

In the Council's view, the level of scrutiny of a reviewing court is a significant issue. Section 19 [*20*] of the HPA must be considered the Ministry's view as to the appropriate scope of judicial review for, as noted, the Terms of Reference indicate that the HPA embodies the *core principles* of professional regulation. In any event, the case law regarding appeals from administrative bodies, and in particular professional regulatory colleges, indicates that courts do apply a level of deference no matter what the statute says. In this regard, in the case of Pezim v. B.C. Securities Commission, [1994] 2 S.C.R. 557, the Supreme Court of Canada ruled that certain specialized tribunals will receive deference even in the face of a right of appeal where the matter falls within their specialized expertise.

3. The College agrees with two points the Council made regarding registration:

- First, the College states that it would not object to changing the current 45-day appeal period in section 54 of the DA to a 30-day appeal period as set out in section 39(8) [*40(8)*] of the HPA.
- Second, Article 4.01(h) of the DA Rules provides that the College may disapprove of educational institutions from time to time. The College stated that it now requires National Dental Examining Board (the NDEB) certification as a prerequisite to registration and therefore this provision could be removed.

4. Finally, regarding registration requirements for entry into the profession, the Council asked the College and the Federation various questions about their registration committee structure as compared to the HPA. In response, the College makes some good points about the nature of registration under the DA and gave reasons why it requires a more flexible registration structure than that under the HPA. The Council will address this matter further under the heading "Improvements to the HPA".

(c) Quality Assurance Mechanisms

Under this heading, schedule B of the Terms of Reference states that there should be effective mechanisms for monitoring practitioner competency including the ability to set continuing education requirements, and a committee of the board should be responsible for reviewing standards of practice and codes of ethics.

In its submission, the College outlines in detail its continuing education requirements, describes its patient relations program, and standards of practice and code of ethics committees. In the Council's view, the College has clearly indicated substantial compliance with this *core principle*.

(d) Complaint and Disciplinary Process

A review of the HPA and the principles outlined in schedule B to the Terms of Reference indicates that a designated health profession's complaints and discipline process must, at a minimum, incorporate certain key elements:

- the investigative and adjudicative bodies must be made up of different people and the bodies administered independently;
- dissatisfied complainants and registrants must be afforded rights of appeal;
- the process must be consistent with the rules of natural justice, and provide for proper notice of a proceeding and a right to be heard; and
- the process must not be complex: complainants and registrants must understand how the process works.

The Council has several concerns regarding the complaints and discipline process provided for in the DA, and the College responded to many of these concerns in its original submission. In a recent letter to the Council, the College indicates that it is withdrawing its objections to several of the Council's concerns, including those related to the contents of notices of citations, procedural rights in disciplinary hearings, section 70 [72] of the DA and the offence provisions in the DA.

Nonetheless, the Council was requested to review the current legislation governing dentistry and the Council notes the following concerns about the current complaints and discipline process.

1. The College strongly objects to the inclusion of sections 32(3) and (4) [*33(5) and (6)*] of the HPA in the DA. Those sections provide that the inquiry committee must request the registrant who is the subject of an investigation to provide it with relevant information and that the committee must consider the information prior to making a decision regarding what further action, if any, will be taken. The College believes that such a provision would make the "investigating body a decision making body with all the attendant problems", and submits that an investigatory body should not have to observe the rules of natural justice.

The Council disagrees. Sections 32(3) and (4) [*33(5) and (6)*] of the HPA are basic, minimum fairness requirements, and are far from onerous to apply in practice. As to the College's general comments regarding fairness in the investigative process, the Council notes that even in cases where natural justice does not apply, procedural fairness does and there is always a duty to be fair (Knight v. Indian Head School Division No. 19 of Saskatchewan, [1990] 1 S.C.R.653).

2. Section 33(1) [*34(1)*] of the HPA provides that the inquiry committee must report to the board in all cases where it decides not to issue a citation. Section 33(2) [*34(2)*] provides a complainant with a right to appeal decisions not to issue a citation to the board. The College objects to both sections. The Council accepts that a requirement to report to the board in all cases in which a complaint is not pursued is not an efficient use of the College's resources. With respect to an internal appeal, the College notes that section 54 [*55*] of the DA already provides dissatisfied complainants with a right of appeal; however the appeal is to the Supreme Court, not to the College council. The Council believes that there should be an internal right of appeal to the College council in cases where the investigative committee decides not to refer a matter to the discipline committee.

3. Section 39 [*40*] of the HPA sets out the procedures for appeals of disciplinary matters. The College makes the same argument regarding appeals of disciplinary matters that it made regarding appeals of registration matters - that an appeal should not be a trial de novo. As the Council has already indicated, the level of scrutiny of a reviewing court is a *core principle* which is properly contained in the professional statute.

4. The Council is concerned about section 79 [*81*] of the DA which provides that it is an offence for a person to give a public demonstration of skill in the practice of dentistry or to demonstrate or exhibit to the public specimens, models or examples of work. The College submits that such demonstrations of skill would not enhance public understanding of the profession, would lead to competitions amongst dentists to put on entertaining displays and would simply bring the profession into disrepute.

The Council recognizes that the role of a College includes regulating advertising and marketing of services. Indeed, the current HPA model bylaws contain several provisions related to advertising. However, the Council believes that section 79 [*81*] may be more than is necessary to fulfil this role, and may unduly restrict both dentists' freedom of expression and the public's right to information about the profession. The Council also notes that the restriction is not limited to registrants of the College but extends to any "person".

In the Council's view, such restrictions may well violate members' personal rights and freedoms under the Canadian Charter of Rights and Freedoms (see, for example, Rocket v. Royal College of Dental Surgeons (Ontario), [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68, 47 C.R.R. 193, 111 N.R. 161, 40 O.A.C. 241). In short, the Council does not believe this provision is in the public interest.

5. The College agrees with several points the Council made regarding the complaints and discipline process:

- that article 16.19(c) of the DA Rules which sets out notice requirements for disciplinary hearings be increased from the present 10 days to 30 days;
- that article 16.19(b) of the DA Rules which provides that the registrar may appoint a member of the discipline panel be removed;
- that the time period for an appeal in section 54 [*55*] of the DA be decreased from the present 45 days to 30 days;
- that section 50(3) [*51(3)*] of the HPA which prohibits prosecution for offences after two years should be included in the professional statute;
- that section 36 [*37*] of the HPA which sets out the requirements for notices of citation be included in the DA;

- that section 37 [*38*] of the HPA which sets out the procedures for discipline committee hearings be included in the professional statute;

- that offence sections such as the offences described in sections 13 and 30 [*13 and 31*] of the HPA, be included in the professional statute; and

- that section 70 [*72*] of the DA, which places the burden of proof on the defendant regarding certain issues in prosecutions under the DA, be repealed.

The Council notes that certain of theses issues have already been dealt with in the recently amended DA Rules. In Article 16, concerning professional review and inquiry, the notice requirements for disciplinary hearings have been increased from 10 to 14 days. Further, the registrar's power to appoint a member of the discipline panel has now been removed.

6. Finally, in response to the Council's analysis of the complaints and discipline process, the College raises matters which in the Council's view point out some shortcomings in the HPA - most notably the status of the complainant and the obligation to investigate all complaints. The Council will discuss these matters further under the heading "Improvements to the HPA".

(e) Accountability Mechanisms

Schedule B to the Terms of Reference, under the heading Accountability Mechanisms, states that there should be a requirement for government approval of rules or bylaws. Such a provision is embodied in section 18(3) [*19(3)*] of the HPA. The DA contains a similar provision in section 26(1) [*28(2)*].

Section 18(5) [*19(5)*] of the HPA also provides that the Minister may request a board to amend or repeal an existing bylaw or make a new bylaw for the college if the Minister is satisfied that this is necessary or advisable. Section 18(6) [*19(6)*] of the HPA provides that where a board does not comply with a request under section 18(5) [*19(5)*], the Lieutenant Governor in Council may amend or repeal the existing bylaw for the College or make the new bylaw for the College.

The College submits that section 18(6) [*19(6)*] is contrary to the principle of self-regulation in that it is inconsistent with the notion that expert delegates should formulate rules on professional ethics and practice standards.

The Council disagrees. It is well established that self-regulation is a privilege not a right. Government grants a profession certain rights, such as the exclusive right to use a title or perform certain services, in return for which the profession agrees to regulate the profession in the public interest. As the Seaton Commission stated:

> The purpose of regulating members of a profession is to protect the public from preventable harm. The privilege of self-regulation is granted to a profession by the provincial legislature. It is a social contract between the profession and the public. It is the property of the public the profession claims to serve.
>
> Self government is simply a delegation by the state of its regulatory authority in the professional sphere.

The nature of the relationship between self regulatory bodies and the state was also addressed in the Foulkes Report:

> Thus it is clear that the principle of state primacy over professional decisions has been understood and established over a considerable period of time. In this manner it has been established that the state has not only a continuing and lively interest in the regulation of professions, but that the state has merely delegated to the professions the power of self-government as long as that power is exercised in a manner consistent with the public interest. The state has not abdicated its ultimate authority, but has established the primacy of public legislation over the private regulatory arrangements of the professions.

The power of professional self-regulation has been a right traditionally enjoyed by the professions, but it is a qualified right delegated by the state only so far as that delegation of authority satisfies the criteria of protecting the public interest, and no further.

The government maintains fundamental control through the legislative process through which it can make, amend or repeal a statute. The government can, at any time, change the regulatory structure. Further, accountability mechanisms are frequently enacted through provisions requiring open meetings, public membership on boards and committees, the duty to submit an annual report, and review by the Ombudsman.

The ability to review and scrutinize regulatory instruments is, in the Council's view, simply another means by which government supervises the grant of self-regulation.

The Foulkes Report discussed the general issue of accountability and stated:

> [M]ost jurisdictions not only insist that professional law must be public law, as passed by the legislature and reflecting public policy, but also insist that any by-laws, rules or regulations under professional statutes be reviewed by public authorities and if necessary revoked and repealed by the state. For example, since 1948 the Province of Saskatchewan has written into law the provision that any by-laws, rules or regulations passed by the governing council of a profession must be submitted to the Department of the Provincial Secretary within thirty days of being made, and that these by-laws, rules and regulations may be reviewed by the Legislative Assembly. If these supplementary regulations under the Act are found by the legislature to be beyond the power of the professional body, or to be prejudicial to the public interest, they may be revoked and repealed.

The Foulkes report commented on the lack of a mechanism for reviewing professional rules and regulations in British Columbia:

> [A]lthough there can be no doubt that the legislature has the power to amend professional statutes, at present there is no effective agency able to perform a careful, continuous, and detailed review of such statutes and professional regulations.

This led the Committee to recommend the creation of a tribunal to scrutinize regulations and that the body be granted the power to revoke such regulations if necessary.

The Council recognizes the important distinction between approval of bylaws by the Lieutenant Governor in Council and by the Legislature or some other independent agency. Clearly, this distinction is also important to the bylaw making power set out in section 18(6) [*19(6)*] of the HPA. The Council has received important submissions highlighting the significance of this distinction, and will be considering this issue further. However, for the purposes of this preliminary report, the Council will be treating the present section 18(6) [*19(6)*] as indicative of a *core principle* of professional regulation.

The Council further notes that although a provision like section 18(6) [*19(6)*] of the HPA does not appear in any of the statutes related to the traditional professions, section 18 [*19*] currently applies to the several professions governed under the HPA, many of which have a long history of self-regulation.

Further, the Council notes that a similar provision has been in place in Ontario for over twenty five years.

Under the Ontario Health Disciplines Act (HDA) which was enacted in 1973, most of the health professions' rule making power was subject to Ministerial review and Cabinet approval. In addition, the HDA also gave the Minister the power to review and make, amend or revoke regulations. Section 3 stated:

> 3.--(1) It is the duty of the Minister to ensure that the activities of health disciplines are effectively regulated and co-ordinated in the public interest, to have appropriate standards of practice developed and ensure that these are maintained and to ensure that the rights of individuals to the services provided by health disciplines of their choice are maintained and to these ends to,
>
> (c) review proposals by a Council for changes in legislation or regulations of concern to that Council;
>
> .....
>
> (e) request a Council to make, amend or revoke regulations respecting any of the matters specified in its applicable Part...
>
> .....
>
> (2) Where the Minister requests in writing that a Council make, amend or revoke a regulation under clause (1) (e) and the Council has failed to do so within sixty days after the request, the Lieutenant Governor in Council may make the regulation, amendment or revocation specified in the request.

The successor legislation to the HDA, the Regulated Health Professions Act (RHPA) contains similar provisions. Section 95 of the RHPA contains an extensive list of a regulatory body's rule making powers which are subject to Cabinet approval. Section 5(1)(c) of the RHPA provides that the Minister may,

> require a Council to make, amend or revoke a regulation under a health profession act or the *Drug and Pharmacies Regulation Act*.

Section 5(3) and (4) provide:

> (3) If the Minister requires a Council to make, amend, or revoke a regulation under clause (1)(c) and the Council does not do so within sixty days, the Lieutenant Governor in Council may make, amend or revoke the regulation.
>
> (4) Subsection (3) does not give the Lieutenant Governor in Council authority to do anything that the Council does not have authority to do so.

In short, in the Council's view section 18 [*19*] of the HPA is entirely consistent with the principles of self-regulation, the practice in other jurisdictions and indeed with the practice of other health professions in British Columbia. Section 18 [*19*] is not a challenge to professional self-regulation nor does it undermine the principle of self-regulation. Rather, it is simply another accountability mechanism which underscores the notion that self-regulation is a privilege, not a right.

Also, in regard to section 18 [*19*] of the HPA, the College states that there needs to be a consultative process in place so that the College and the Ministry can be involved and informed prior to rule changes. The Council notes that section 18(6.1) [*19(7)*] of the HPA embodies just such process. That section provides that prior to acting under section 18(6) [*19(6)*] the Minister must provide notice of every proposed rule change to the college of each health profession.

In the course of preparing its recently completed preliminary report on the profession of registered nursing, the Council was persuaded that certain improvements could be made to the bylaw approval process in section 18 [*19*] of the HPA. First, the Council is of the view that the Minister should ensure that the rule approval process does not result in inordinate delay, and suggests that the Minister explore methods to ensure rules are approved in a timely fashion. Second, the Council feels that not all rules should be subject to Lieutenant Governor in Council approval. Sections 94 and 95 of Ontario's RHPA Procedural Code provide a useful guide to the matters which should be subjected to additional scrutiny. The Council would welcome further submissions on this important point.

Finally, regarding accountability mechanisms, the College agrees with section 21 [*22(1)*] of the HPA which provides that the register and bylaws of the College shall be open to inspection by any person.

(f) The HPA Bylaws

The Terms of Reference direct the Council to conduct a comparative analysis of the HPA with each professional statute, along with any relevant rules, regulations or bylaws, in order to ensure that they contain the *core principles* of professional regulation. The Terms of Reference also indicated that the HPA embodies those *core principles* of professional regulation which the Minister considers are desirable or essential for regulating the profession in the public interest.

In the initial phase of the review process, the Council also considered the HPA draft bylaws. These bylaws are distributed to newly designated professions as a guide for drafting bylaws for their new regulatory colleges. Several questions in the Council's comparative analysis referred to the draft bylaws. The Council informed the professions that although the bylaws were not legally binding, they reflected the Ministry's view of provisions which were desirable for regulating a profession in the public interest.

During the review process, the original draft bylaws were substantially rewritten, and many provisions were removed and some added. This complicated the Council's process as its initial questions referred to the original draft of the bylaws. The revisions also underscored the fact that the bylaws were not legally binding, and subject to modification, making it somewhat difficult to assess which bylaw provisions embody *core principles* of professional regulation.

Nonetheless, many provisions appear in both versions of the draft bylaws, and are also consistent with the *core principles* discussed in the Terms of Reference. The Council felt it important to note where provisions in the DA could be considered inadequate, incomplete or missing having regard to the draft bylaws. The Council has decided to include its account of such provisions in this separate section in order to reflect the fact that the bylaws have a different legal status than the HPA.

In its review of the DA, the Council notes the following:

1. Original draft bylaws 46 and 49 [*bylaws 65 and 66*], provide for notice of decisions of the discipline committee and retention of records of the discipline committee. These provisions are not contained in the DA but the College states that it currently undertakes the obligations described by these provisions. Thus, the College does not appear to object to these provisions but notes that there should be a discretion extended to it not to disclose discipline decisions and records thereof in certain circumstances. The Council accepts that there should be some discretion in this regard but that it should be strictly confined to well defined circumstances.

Schedule 2 of the RHPA of Ontario is the Health Professions Procedural Code sets out procedural rules applying to all health professions in Ontario. Section 56 thereof provides for the publication of the Discipline Committee's decisions:

> 56.--(1) The College shall publish a panel's decision and its reasons, or a summary of its reasons, in its annual report and may publish the decision and reasons or summary in any other publication of the College.
>
> (2) In publishing a decision and reasons or summary under subsection (1), the College shall publish the name of the member who was the subject of the proceeding if,
>
> (a) the results of the proceeding may be obtained by a person from the register; or
>
> (b) the member requests the publication of his or her name.
>
> (3) The College shall not publish the member's name unless it is required to do so under subsection (2).

Further, section 23(3) of the Procedural Code states:

> (3) A person may obtain, during normal business hours, the following information contained in the register:

1. Information described in clauses (2) (a) to (c).

2. Information described in clause (2) (d) relating to a suspension that is in effect.

3. The results of every disciplinary and incapacity proceeding completed within six years before the time the register was prepared or last updated,

    i. in which a member's certificate of registration was revoked or suspended or had terms, conditions or limitations imposed on it, or

    ii. in which a member was required to pay a fine or attend to be reprimanded or in which an order was suspended if the results of the proceeding were directed to be included in the register by a panel of the Discipline or Fitness to Practise Committee.

3.1 For every disciplinary proceeding, completed at any time before the time the register was prepared or last updated, in which a member was found to have committed sexual abuse, as defined in clause 1 (3) (a) or (b), the results of the proceeding.....

These provisions may serve as a blueprint for similar provisions in the HPA which the Council believes should distinguish between a disclosure by the Inquiry Committee and disclosure by the Discipline Committee. In the former scenario, the Inquiry Committee should not be obliged to disclose every decision it has made regarding a case involving a member of the profession. This would address the College's concern regarding disclosure of matters resolved through voluntary undertakings. However, in the Council's view, decisions of the Discipline Committee should generally be available to the public.

2. Original draft bylaws 11 and 12, now bylaws 12 [*12(4)] and 23 [23(3)*], provide that meetings of the board of the college as well as all committee

meetings must be open to the public. These provisions also create a discretion to close meetings in certain circumstances. While the DA provides that hearings of the inquiry panel are generally open, there are no such provisions regarding the college council or the other committees. The College submits that keeping the committee meetings open to the registrants and the public would unduly disrupt and delay the proceedings. It argues that committee proceedings have no direct impact on the public or registrants.

The Council appreciates the College's concern but believes that meetings of the College board as well as the registration, inquiry and discipline committee should generally be open to the public, subject to a discretion to exclude the public in certain circumstances. Bylaws 11(3)(a) to (d) [*12(5)(a) to (d)]* of the HPA provide a guide to the circumstances in which the public may be excluded:

> (5) The board may exclude any person from any part of a meeting if it is satisfied that
>
> (a) financial or personal or other matters may be disclosed of such a nature that the desirability of avoiding public disclosure of them in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that meetings be open to the public,
>
> (b) a person involved in a criminal proceeding or civil suit or proceeding may be prejudiced,
>
> (c) personal matters or property acquisitions will be discussed, or
>
> (d) instructions will be given to or opinions received from legal counsel for the college, the board or committees.

3. Original draft bylaws 13, 14 and 15, now bylaws 14 [*14(2)]*, 15 *[15(2)*] and 16 [*16(2)*], provide for one-third public representation on the college committees.

The College objects to such provisions, though it supports generally the idea of public membership. In the Council's view, public membership on major committees is an important accountability mechanism which should be included in the professional statute. Such requirement improves public accountability and is in the public interest.

The Council notes that the recently amended DA Rules now provide for one-fourth public representation regarding the composition of the review panel and the inquiry panel, as set out in articles 16.09 [*16.07(b)*] and 16.18 [*16.16(b)*].

(g) General Conclusions from Comparative Analysis

After a careful review of the DA, the DA Rules as well as the Federation Bylaws, the Council is of the view that the legislation regarding the profession of dentistry is for the most part consistent with the *core principles* of professional regulation. However, on some important issues, notably those related to the complaints and discipline process and the mandate of the regulatory body, the Council found several provisions to be inadequate, incomplete or missing having regard to the *core principles* embodied in the HPA and discussed in the Terms of Reference.

(2) IS THERE A NEED FOR A SEPARATE ACT?

The Council proposes to address this issue by discussing the general policy favouring designation and the profession specific arguments regarding designation.

The general policy favouring designation

As stated in the introduction to this report, the Terms of Reference reflect a general policy that designation is the favoured option, and that a profession must **justify** a continuing need for a separate statute. The Council would like to expand on this important issue.

Under the existing regulatory system, each profession is governed by its own professional statute. The terminology used as well as the regulatory structures and processes created vary widely from profession to profession, especially with respect to the complaints and discipline process. This variation and resulting complexity is confusing to the public and registrants. In the Council's view, a uniform regulatory system under the HPA would eliminate much of the complexity and confusion, and foster the development of a common jurisprudence for the health professions.

Several recent reports of Royal Commissions and government policy statements in several provinces have emphasized that an integrated approach to the delivery of health care is in the public interest. Coordination and cooperation amongst health care providers is of fundamental importance to such an approach, and in the Council's view, a uniform regulatory structure enhances the government's ability to apply health care policy consistently.

One policy initiative for which coordination and consistency is particularly relevant is the scope of practice review process the Council is currently conducting. The Minister has requested that the Council review the scopes of practice of the existing professions with a view to implementing a new regulatory framework for health professions in British Columbia. The key elements of the new framework are broad, non-exclusive scope of practice statements and narrowly defined reserved acts. Reserved acts are those elements of a profession's scope of practice which present such a significant risk of harm that they should be reserved to a particular profession that is qualified to perform them. The new system will create shared scopes of practice, and it is likely that many of the reserved acts will be shared amongst particular professions. In the Council's view, a uniform regulatory structure would ease the implementation of the new model of professional regulation.

A general policy favouring a uniform regulatory structure was referred to in the report of the Seaton Commission on Health Care in British Columbia. The following excerpts are from that part of the Commission's report which deals with regulation of the health professions:

> There is a lack of consistency among the 16 provincial acts that govern the health care professions, despite the fact that all of the colleges established under the acts have the same legislative mandate: to protect the public from preventable harm. Such inconsistency increases the likelihood of variations in judicial interpretations of the acts. Underlying this situation are persistent jurisdictional disputes and a distinct lack of cooperation among the health care professions.
>
> ...
>
> In general, a lack of consistency characterizes the acts with respect to complaints, discipline and appeals, resulting in insufficient public accountability, no uniformity in the structure or organization of the different statutes, and an absence of common terms.

> ...
>
> The Health Professions Act has the potential to influence significantly the future of self regulation of health care professions. Under this new Act, the Health Professions Council can make recommendations to the minister concerning which groups should be granted self-regulation status, their titles, and the extent of their scopes of practice, if any. The Act could be used to create uniform legislative procedures.

These views led the Commission to conclude that the existing health professions act should be repealed and the HPA revised to serve as the umbrella act for regulating health professions.

The general policy of legislative uniformity is also consistent with initiatives in several other provinces, notably Ontario which has implemented umbrella legislation for the health professions and Alberta which is in the process of enacting umbrella legislation.

The Council accepts the desirability of uniformity in legislation and believes that, as a general rule, designation under the HPA is the preferred option. This general policy favouring designation is embodied in the Terms of Reference which refer to the desirability of a "high degree of consistency between statutes" and of "minimiz[ing] the number of statutes that apply to the governance of health professions". Indeed, the Terms of Reference and attached criteria and guidelines make it clear that the Council is to consider whether there are unique features of the profession or other relevant factors that justify a need for a separate statute.

However, the Council again emphasizes that although the policy preference is for uniform legislative structures, the HPA model still embodies a strong commitment to self-regulation through the "college" system of regulation.

With this in mind, the Council proposes to now review the arguments presented by the College and the Federation which they believe justify the continuing need for a separate statute.

The profession specific arguments regarding designation

First, the Federation argues that jurisprudence has built up under the DA which would be lost or diminished if dentistry were to be designated under the HPA. The Council finds this statement difficult to assess in the absence of specific examples of how the public interest would be compromised by the possible loss of precedent under the DA. In any event, in the Council's view, the existence of jurisprudence in and of itself is not an argument in favour of a separate statute. Indeed, the Council recognizes that judicial precedent which is inconsistent with government policy is frequently the reason for legislative change.

The Federation is also concerned that precedent developed under the HPA would apply to all professions. The Council finds this submission unpersuasive. As noted previously, the wide variation in the existing statutes and the resulting confusion amongst registrants and the public alike is one of the reasons favouring a uniform regulatory structure. In the Council's view, a common jurisprudence for all health professions is in the public interest.

The Federation next submits that designation would hinder the ability of the College to be proactive in implementing legislation intended to protect the public. It argues that professions designated under the HPA would relinquish some or all responsibility for initiating public protection measures since this role would now be undertaken by the Council. The College makes a similar submission. It states that the existing structure under the DA and Rules recognizes the need not only for the regulatory functions of the professional college but also the advisory and support functions provided by the Professional Resources Division of the College.

In the Council's view, these concerns are misplaced. There is nothing in the HPA to indicate that the Council has any role in regulating colleges. Further, the HPA still provides for self-regulation, albeit with different processes and structures, and a college designated under the HPA still has the same fundamental purpose of governing the profession in the public interest. All professions designated under the HPA would continue to be governed, in part, by a regulation containing provisions to deal with profession specific matters. The HPA also provides a college with extensive bylaw making powers including the power, set out in section 18(1)(r) [*19(t)*] of the HPA, to establish any "other committees the board determines are necessary or advisable".

Finally, both the Federation and the College submit that the practice of dentistry is unique and that therefore designation is not appropriate. They note that dentistry does not rely on government funding, that dentistry recognizes the need for continuing education, and that dentistry is delivered by independent practitioners. However, neither the College nor the Federation describe specifically how these factors support the continuing need for a separate statute. Indeed, the Council notes that several professions which have already been designated under the HPA do not rely on government funding and are practised independently.

In summary, the Council is of the view that the Federation and the College have not presented sufficient reasons to justify the continuing need for a separate statute.

(3) THE COUNCIL'S CONCLUSION REGARDING DESIGNATION

As noted in the introduction to this report, in determining whether a profession should be designated under the HPA the Council must balance the extent to which the present professional statute embodies the *core principles* of professional regulation and whether there are unique features about the profession or other relevant factors that justify the continuing need for a separate statute.

In considering this matter, the Council believes that although the legislation regarding dentistry is for the most part consistent with the *core principles* of professional regulation, the general policy favours designation under the HPA.

The Council would like to emphasize that its conclusion regarding designation is in no way intended as a slight to the College. The Council agrees with the College that it has done an excellent job in regulating the practice of dentistry in the public interest. The DA is, in many respects, one of the best professional statutes the Council has reviewed, and the College has clearly taken its obligations seriously and developed many programs in advance of other professions. But, as already noted in the introduction to this report, that is not the issue before the Council. Rather, the Council has been issued Terms of Reference which embody a clear policy preference for uniform legislative structures.

The Council's primary task in conducting this review is to determine whether a separate statute is justified, and the burden is on the profession in this regard.

In the Council's view, the College and the Federation have failed to discharge this burden. Having said this, the Council wishes to emphasize that the enactment which has the greatest impact on the activities and conduct of the members in the day to day practice of their profession is clearly the College itself with its rules, regulations and bylaws, not the statute which creates them. Regardless of whether the relevant statute is the DA or the HPA, from the members' perspective, it is the College which has the primary role. In that regard the Council has no doubt the College will continue to fulfil its regulatory functions in an exemplary manner, regardless of the statutory structure employed.

(4) IMPROVEMENTS TO THE HPA

In the course of its review of the DA, the Council has determined that there are several matters upon which the HPA could be improved. These include the following:

1. The Council discussed above, at page 25, the issue of records of disciplinary decisions, and concluded that although records of disciplinary decisions should generally be available to the public, there ought to be a discretion not to disclose disciplinary actions in certain cases. Therefore, the Council suggests that the HPA be amended to indicate that decisions of the discipline committee ought generally to be available to the public, and actions taken by the inquiry committee through voluntary undertakings need not be available to the public.

2. The College objects to section 37(2) [*38(2)*] of the HPA which states that a complainant may appear as a party at a hearing of the discipline committee. The College objects to giving the complainant any status as a party in a disciplinary hearing:

> A disciplinary hearing in this regard is akin to a criminal trial. In a criminal trial the victim is not a party, the only parties are the Crown and the accused. That is because the Crown is the party aggrieved by the breach of the Criminal Code and the party with the obligation to enforce the Criminal Code. Those are not the roles of the victim. While it is important that the Court in criminal matters hears from the victim during sentencing as to impact, the victim should otherwise be a witness and not a party.

> The same applies to disciplinary hearings. It is the duty and obligation of self regulating professions to prosecute members who act inappropriately on behalf of the public as a whole. It is the profession that is aggrieved by a breach of the professional standards of the profession because it brings the profession into disrepute. People who complain to the College are important to that process as they initiate the investigation, but thereafter, a complainant should only be a witness to the College's disciplinary actions. There is a very real possibility that if a complainant is given party status at a disciplinary hearing their focus will not be on protection of the general public, but on their own interest. A disciplinary hearing may be used by a complainant as an examination for discovery in aid of a civil action against the member.

The Council generally agrees with these submissions. Obviously, the complainant is a crucial part of the discipline process but in the Council's view, the regulatory body is responsible for prosecuting the complaint on behalf of the public and a complainant should not be made a "party" to the proceeding. The Council agrees that granting a complainant party status can have detrimental effects on the process. Nonetheless, the Council believes that the HPA and the *core principles* indicate the importance of involving the complainant in the process. In particular the core principles state that appropriate rights of appeal should be available to both members and complainants. In the Council's view, the complainant should be given the right to appear at the disciplinary hearing and a right of appeal, but the HPA should be amended to remove the right of the complainant to appear as a "party".

3. Section 19(1) [*20(1)*] of the HPA provides that the registration committee is responsible for granting registration to applicants. The College states that in dentistry, registration is generally an administrative task which can be handled by the registrar. The requirements for registration are explicitly set out in the DA Rules, and applicants who meet the requirements are registered. Only in non-standard situations is the registration committee required to deal with an application. The Council agrees that especially for larger professions in which the requirements for registration are clear, a committee need not consider every application. Therefore, the Council recommends that section 19 [*20*] of the HPA be modified to provide for a more flexible registration process, including a registrar's review in appropriate circumstances.

4. Section 22(5)(b) [*26(5)(b)*] of the DA provides that the College may grant limited registration where a person is the subject of a proceeding in B.C. or elsewhere which could result in suspension or limitations on the person's licence. The College points out that this provision is necessary in order to deal with persons changing jurisdictions once disciplinary proceedings against them have been commenced. In the Council's view this provision is an effective public safety measure and recommends that it be incorporated into the HPA. Further, as noted above, the Council supports the inclusion of a "good character" requirement in the provisions regarding registration.

5. The combined effect of sections 31 [*32*] and 32 [*33*] of the HPA appears to be that all complaints must be investigated by the inquiry committee. The College states that it receives approximately 1400 phone complaints and 400 written complaints each year, and that it is simply not possible to fully investigate all complaints. The College also states that its registrar is successful in mediating many of the complaints. The Council agrees that a requirement that all complaints be investigated by the inquiry committee is not an effective use of a College's complaints and disciplinary processes.

With respect to the issue of a committee investigating all complaints, the Council's view is that the HPA does not intend that the inquiry committee must conduct an investigation in all cases. Although s. 32(4)(a) [*33(6)(a)*] of the HPA states that all complaints must be investigated, it is prefaced by the words "[w]here a complaint is delivered" found in s.32(1) [*33(1)*], thus indicating that in some cases complaints will not be referred.

Further, the Council notes that the Registrar may also be designated as an inspector, pursuant to section 26(2) [*27(2)*] of the HPA, and the Registrar is mandated to deliver to the inquiry committee a copy of the complaint, an assessment thereof and any recommendations for the disposition of the complaint, according to section 31(2) [*32(2)*] of the HPA.

In the Council's view, the HPA clearly intended that the Registrar would be able to deal with minor complaints summarily, and the inquiry committee would only need to conduct an investigation in cases where the Registrar refers the matter to that committee. The Council agrees that a registrar or other designate can play an invaluable role in the initial handling of complaints.

Therefore, the Council recommends that the HPA be clarified to more clearly state that an initial summary review process is appropriate. In particular, the Council believes that the Registrar should be given the discretion to dismiss complaints in the circumstances set out in section 32(4) [*33(6)*] of the HPA. The Council also believes that the registrar should clearly be granted the jurisdiction to mediate complaints.

However, the Council believes that any summary review process conducted by the registrar must provide that decisions to dismiss complaints are subject to an internal right of appeal to the inquiry committee of the College.

6. There are several references in the comparative analysis to the terms "professional misconduct" and "conduct unbecoming". Neither the HPA nor the current draft bylaws use the term "conduct unbecoming"; however, the HPA refers (for, example in section 32 [*33(4)(c)*]) to professional misconduct. The College makes a persuasive argument that both terms are defined in the common-law, and are necessary to regulate the profession in the public interest. In addition, the Council notes that in his book, "The Regulation of Professions in Canada" (Carswell, 1994) James Casey notes that both terms are well recognized in the law of professional regulation. Professional misconduct has been generally accepted to relate to conduct while actually engaged in the practice of the profession, while conduct unbecoming relates to conduct not in the course of the practice of the profession.

The Council accepts that in some cases conduct occurring outside the practice of one's profession may be cause for disciplinary proceedings by a professional college. In such cases, however, the conduct must be relevant to a member's suitability to practice the profession. Therefore, the Council believes that the HPA should be clarified to ensure that it encompasses both "professional misconduct" and "conduct unbecoming".

7. Section 33 [*34*] of the HPA provides that when the inquiry committee decides not to pursue an investigation or decides not to refer a matter to discipline, it must report to the board. The College states that such a requirement is difficult to follow given the large number of complaints it receives, many of which are resolved by the registrar. The Council agrees that this reporting requirement is too onerous, particularly for larger colleges which receive several hundred complaints a year. Thus, the Council recommends that this requirement be removed from the HPA. However, the Council believes that decisions to dismiss a complaint should be subject to an appeal. Although the College notes that section 54 [*55*] of the DA provides for an appeal, that appeal is to the Supreme Court. In the Council's view, parties should be provided with an internal right of appeal to the College council (or board) in respect of complaints dismissed by the inquiry committee.

8. The College makes a good point about section 38(2) [*39(2)*] of the HPA which sets out the order requirement for the discipline committee. It submits that a simple order is not enough and that generally the common law requires that reasons be provided. The Council believes that written reasons are an important aspect of the discipline committee's function and the HPA should be amended to impose a clear reasons requirement.

9. Article 5.05(e) [*5.05(e)(i)*] of the DA Rules provides that members must report to the registrar immediately if they believe a current or former registrant has committed certain specified acts, including any contravention of the DA or its Rules. Although the previous version of the draft HPA bylaws contained a reporting requirement, it does not appear in the current version. In the Council's view, a reporting requirement is a strong public interest measure which should be included in the HPA, and article 5.05(e) [*5.05(e)(i)*] of the DA is a useful precedent.

The Council expects that further improvements to the HPA will come to its attention as it proceeds through the review process for each of the existing professions. The Minister has asked that the Council's final report deal with all professions, and the Council intends to include in the report a comprehensive list of suggested improvements to the HPA.

D. Recommendation

The Health Professions Council recommends to the Minister of Health and Minister Responsible for Seniors that the Dentists Act be repealed and the profession of dentistry be designated under the Health Professions Act.

Appendix: The Terms of Reference and the Criteria and Guidelines.

For the Appendix *Terms of Reference and Guidelines*,
please refer to the Appendix in Part II, Volume 1 – Legislative Review

HEALTH
PROFESSIONS
COUNCIL

HEALTH EMERGENCY ACT
LEGISLATIVE REVIEW REPORT
(PRELIMINARY)

June 1998

FOREWORD

This report is the result of the Health Professions Council's legislative review of emergency medical assistance pursuant to the Terms of Reference from the Minister of Health and Minister Responsible for Seniors. Under the Health Professions Act, the Health Professions Council is a six person advisory body appointed by the Government of British Columbia to make recommendations to the Minister of Health and Minister Responsible for Seniors about the regulation of health professions.

In this report the Health Professions Council examined two issues:

(1) whether designation of the health profession of emergency medical assistance under the Health Professions Act would be in the public interest or whether there are unique features of the health profession, or other relevant factors, that justify a continuing need for a separate statute; and

(2) what amendments, if any, are required to the current statute, rules, regulations and bylaws for the profession of emergency medical assistance to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the Health Professions Act and discussed in Schedule B to the Terms of Reference.

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EXECUTIVE SUMMARY

The Health Professions Council has conducted a comparative analysis of the Health Emergency Act with the Health Professions Act.

After reviewing the analysis and considering the *core principles* of professional regulation embodied in the Health Professions Act and discussed in the Terms of Reference, the Health Professions Council has determined that designation of the profession of emergency medical assistance under the Health Professions Act would not be in the public interest. In the Health Professions Council's view, the unique nature of the profession is not suitable to the self-regulatory structure embodied in the Health Professions Act and therefore designation is not in the public interest.

HEALTH EMERGENCY ACT LEGISLATIVE REVIEW REPORT (PRELIMINARY)

I. INTRODUCTION

This is the preliminary report of the legislative review of the Health Emergency Act (the HEA) conducted by the Health Professions Council (the Council).

The review was conducted pursuant to the Terms of Reference issued by the Minister of Health and Minister Responsible for Seniors in accordance with section 24, now section 25, of the Health Professions Act (the HPA).[1]

The Terms of Reference direct the Council to review the governing statutes for each of ten health professions, of which emergency medical assistance (EMA) is one.

A. THE NATURE OF THE REVIEW

The purpose of the review as set out in the Terms of Reference is twofold:

(a) To determine whether designation of the health profession under the HPA would be in the public interest or whether there are unique features of the health profession, or other relevant factors, that justify a continuing need for a separate statute.

(b) To determine what amendments, if any, are required to the current statute, rules, regulations and bylaws for each profession to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference.

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[1] During the early drafting of this Report statute references were based on RSBC 1979 and Amendments. For ease of reference, the older provisions are indicated in brackets next to the current citations. The current versions refer to the Health Professions Act, RSBC 1996, Chapter 183, and the Health Emergency Act, RSBC 1996, Chapter 182.

The Terms of Reference and the Criteria and Guidelines which expand upon them are included as an Appendix to this report.

The Council's primary task in conducting the legislative review is to determine whether it is in the public interest that a health profession be designated under the HPA. The analysis of whether the professional statute contains the *core principles* of professional regulation is an important element in the consideration of whether designation is in the public interest. The extent to which a professional statute currently embodies these *core principles* is clearly one of the factors the Council must consider in making this determination.

However, the *core principle* analysis is not the only factor that must be considered. The Terms of Reference reflect a general policy that designation under the HPA is the favoured option. They refer to the desirability of minimizing the number of statutes that govern the health professions and the importance of a high degree of consistency among statutes. The Terms of Reference also direct the Council to consider specifically whether there are unique features of a health profession or other relevant factors that **justify** a separate statute. In the case of EMA, the Terms of Reference also direct the Council to have particular regard to the role of the Emergency Health Services Commission and the terms of the collective agreement in its review.

In summary, in determining whether a profession should be designated under the HPA the Council must consider, first, whether there are unique features of the profession or other relevant factors that justify the retention of a separate statute and, second, the extent to which the current professional statute embodies the *core principles* of professional regulation.

B. THE PROCESS FOR THE REVIEW

The general process for the review provides for an initial meeting with the profession, preparation by the Chair of the Council of a comparative analysis of the profession's current statute with the HPA, consultation with the profession regarding the analysis, drafting of a preliminary report, discussion of the preliminary report within the Council, consultation meetings and a final report.

The Council Chair met with representatives of the Emergency Medical Assistants Licensing Board (the Board), the B.C. Ambulance Service (the BCAS), and representatives of C.U.P.E. Local 873 (the Union) on May 1, 1995 to discuss the review process. In a joint submission dated July, 1995, all three bodies indicated their support for the present legislative structure.

The Chair then completed the comparative analysis of the HEA and the HPA, and provided the Board and the Union with a detailed summary of the analysis of the HEA. The Board and the Union were asked to provide responses to a number of questions and to describe the unique features of EMA, or any other relevant factors, that justified the retention of a separate statute. In response, the Board made a written submission on July 10, 1996.

The Chair then completed this preliminary report which will be circulated to all health professions and other interested parties upon request.

II. DISCUSSION OF ISSUES

As noted above, the Council's primary focus in conducting this review is to determine whether designation of the profession of EMA under the HPA would be in the public interest. The Council has determined that it would not be in the public interest for the profession of EMA to be designated under the HPA and proposes to discuss its conclusion by considering first, whether there is a need for a separate statute, and second, whether the HEA contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference.

A. IS THERE A NEED FOR A SEPARATE ACT?

The Council proposes to address this issue by discussing the general policy favouring designation, the regulatory structure for EMA and the profession specific arguments regarding designation.

1. The General Policy Favouring Designation

As stated above, the Terms of Reference reflect a general policy that designation is the favoured option, and that a profession must **justify** a continuing need for a separate statute. The Council would like to expand on this important issue.

Under the existing regulatory system, each profession is governed by its own professional statute. The terminology used as well as the regulatory structures and processes created vary widely from profession to profession, especially with respect to the complaint and disciplinary process. This variation and resulting complexity is confusing to the public and registrants. In the Council's view, a uniform regulatory system under the HPA would eliminate much of the complexity and confusion, and foster the development of a common jurisprudence for the health professions.

Several recent reports of Royal Commissions and government policy statements have emphasized that an integrated approach to the delivery of health care is in the public interest. Coordination and cooperation amongst health care providers is of fundamental importance to such an approach, and in the Council's view, a uniform regulatory structure enhances the government's ability to apply health care policy consistently.

The general policy of legislative uniformity is also consistent with initiatives in several other provinces, notably Ontario which has implemented umbrella legislation for the health professions and Alberta which is in the process of enacting umbrella legislation.

The Council agrees with these statements about the desirability of uniformity in legislation and accepts that, as a general rule, designation under the HPA is the preferred option. This general policy favouring designation is embodied in the Terms of Reference which refer to the desirability of a "*high degree of consistency between statutes" and of "minimiz[ing] the number of statutes that apply to the governance of health professions*".

Nonetheless, the Terms of Reference and attached Criteria and Guidelines make it clear that the Council is to consider each profession individually to determine whether there are unique features of the profession or other relevant factors that justify a need for a separate statute.

2. The Regulatory Structure for Emergency Medical Assistance

a) Historical Development

Prior to 1974, emergency medical services were essentially unregulated. They were provided by both public and private bodies, and the service varied widely.

In 1974, the issue of ambulance service was reviewed by the Foulkes Commission and referred to in its report, "Health Security for British Columbians, Special Report: Consumer Participation, Regulation of the Professions, and Decentralization". Several recommendations were made regarding ambulance service and emergency hospital facilities. The Report stated that ambulance services should be provided by persons employed for that purpose and that services should be provided in a consistent and uniform fashion. One of the Report's recommendations was as follows:

> *That a provincially financed ambulance service be developed on a province-wide basis by the director of the emergency health services unit and ambulance crews be members of the Health Services Unit.*

In 1974, the government established the Emergency Health Services Commission (the Commission) under the HEA. The Commission was given exclusive jurisdiction to provide emergency services throughout the province, and to deal with all matters related to ambulance services, including recruiting and training emergency medical assistants (EMAs).

In its submission, the Board indicates that the reason for the centralization of ambulance services was to avoid the "fractionation" of services. The Board notes that a provincial system provides consistent training and patient care for optimum delivery of pre-hospital care, and that many regulatory functions have been assumed by the employer. The Council notes that other government reports such as the Cain Review[2] and the Boyes Report[3] have supported the notion of a centralized, provincial system.

Over time, it became apparent that there were problems associated with the Commission acting both as employer and licensing body. Specifically, it was felt that it was not appropriate for one body to have the mandate to both hire and license EMAs. As a result, in 1991, the Board was established and given the mandate to examine, register and license EMAs, and investigate complaints made against them.

b) The Present Structure

As a result of these developments, there are essentially two bodies responsible for the delivery of emergency services in British Columbia, the Commission and the Board.

The Commission is not an independent body, but a body made up of senior government employees appointed by the Lieutenant Governor in Council. Pursuant to the HEA the Commission is for all purposes an agent of government, and it is required to submit an annual report to the Minister about its operation.

The Commission's role is set out in section 5(1) [*5(1)*] of the HEA:

> ***Power and authority of commission***
>
> *5 (1) The commission has the power and authority to do one or more of the following:*
>
> *(a) provide emergency health services in British Columbia;*
>
> *(b) establish, equip and operate emergency health centres and stations in areas of British Columbia that the commission considers advisable;*
>
> *(c) assist hospitals, other health institutions and agencies, municipalities and other organizations and persons, to provide emergency health*

---

[2] J.V. Cain, "Review of Pre-Hospital Care", Ministry of Health, Province of British Columbia, July 31, 1989.

[3] Dr. David A. Boyes, "The British Columbia Ambulance Service", March 3, 1992.

services and to train personnel to provide services, and to enter into agreements or arrangements for that purpose;

(d) establish or improve communication systems for emergency health services in British Columbia;

(e) make available the services of medically trained persons on a continuous, continual or temporary basis to those residents of British Columbia who are not, in the opinion of the commission, adequately served with existing health services;

(f) recruit and train emergency medical assistants;

(g) provide ambulance services in British Columbia to be known as the British Columbia Ambulance Service;

(h) perform any other function related to emergency health services as the Lieutenant Governor in Council may order.

Thus, the Commission has a very broad mandate, dealing with virtually all matters related to emergency services, including, under section 5(1)(f) [*5(1)(f)*] of the HEA, the responsibility for recruiting and training all EMAs. Thus, all EMAs are government employees. It is also important to note that all EMAs are represented by one bargaining unit, the Canadian Union of Public Employees.

The Commission is essentially the board of directors for the BCAS which is part of the Ministry of Health. The BCAS is the operational arm of the Commission, and provides it with support. It has full-time staff, including an executive director. The Commission has also established a medical advisory committee consisting of selected medical personnel and educators. The advisory committee's role is to discuss medical protocols and process issues, and to make recommendations to the Commission.

The Board, like the Commission, is made up of Lieutenant Governor in Council appointees. The Board has three members, one of whom must be an emergency medical assistant and another of whom must be a medical practitioner. The third, in practice, has been a lawyer experienced in labour law. The Board reports to and is funded by the Minister.

The Board's role is set out in section 6(5) [*5.1(4)*] of the HEA:

> ***Emergency Medical Assistants Licensing Board***
>
> *6(5) Subject to this Act and the regulations, the board has the power and authority to do the following:*
>
> *(a) examine, register and license emergency medical assistants;*
>
> *(b) set terms and conditions for a licence under this section;*
>
> *(c) investigate complaints;*
>
> *(d) delegate to one or more persons the power and authority to act under one or more of the provisions of paragraphs (a), (b) and (c).*

Thus, the Board's main functions are licensing and discipline.

Support for the Board's activities is provided by the Emergency Medical Assistants Licensing Branch of the Ministry of Health. The Branch has several full time staff, including a Registrar who manages the Board's activities.

Thus, it is clear that the regulatory functions in the profession are shared by the Commission and the Board, with support from various personnel within the Ministry of Health.

c) Summary

The foregoing review of the regulatory structure for EMAs indicates that the profession is not, in fact, a self-regulating profession.

Self-regulating professions are typically governed by officers and directors elected by members of the profession who are given the power, among other things, to set entry and practice standards, and administer a disciplinary regime. In a self-regulatory system, government effectively delegates its administrative and regulatory authority to the profession so that it may govern itself. It is for this reason that when self-regulating status is granted, the legislation implementing the system typically contains several safeguards, such as public membership and reporting requirements, in order to ensure that the regulatory powers are exercised in the public interest. The HPA contains such safeguards.

In contrast, the profession of EMA is regulated both directly and indirectly by government, through the Commission and the Board. The regulatory regime is essentially a government administered licensing and certification system. Of the professions subject to the Council's legislative review the profession of EMA is unique in this regard. This is an important point, because in the Council's view the current regulatory structure is a factor to consider in determining whether a profession should be designated under the HPA which clearly embodies a structure for self-regulating professions.

3. The Profession Specific Arguments Regarding Designation

The Board is of the view that a separate statute is necessary for EMA because of the unique nature of the profession, and in particular its unique regulatory structure.

The following comments regarding the regulatory structure are from a joint submission made by the BCAS, the Board and the Union:

> *Unlike other professions, there is only one employer for all emergency medical assistants (E.M.A.s) working in the Province of British Columbia. A further difference is that the employer is a government body rather than a private or institutional organization.*
>
> *As the employer, the Emergency Health Services Commission (E.H.S.C.), Ministry of Health, is responsible for all pre-hospital emergency care services. As will be discussed in greater detail, it is this environment and its related infrastructure that impacts upon E.M.A. scope of practice.*

In its submission, the Board states that because there is only one employer for EMAs, many regulatory functions have been assumed by the employer:

> *As the single employer, the Commission has developed protocols and procedures, on the basis of recommendations put forth by the Medical Advisory Committee, which will apply to all E.M.A.s in the Province. In addition to ensuring consistency, it affords the general public a high level of comfort in what care is being provided. All training is provided by the Paramedic Academy; protocols are only changed, added or deleted if recommended by the Medical Advisory Committee; and local, regional or provincial needs can be quickly addressed since the information flows from one source.*

> *The existence of a single employer, bargaining unit and current legislation also facilitates free movement of patients throughout the Province. Given the immense geographical area that needs to be covered and location of tertiary hospitals in urban areas, this concept is of critical importance. The passage of time has demonstrated the current infrastructure to function very well.*

The Board states that the one employer, centralized approach to regulation is necessary in order to ensure consistent training and patient care. Further, it states that government must provide the service in order to ensure province wide delivery, because private providers would not operate in less populated areas.

The Board also points out that registration requirements and post employment training differ significantly from that of other health professions. It states that for EMAs, all training specific to the job is completed after employment and entirely by the employer through the Justice Institute of B.C. All training is job specific and standardized because it is provided by one facility, the Paramedic Academy, Justice Institute of BC. As regards registration criteria, the Board emphasizes the unique features of EMA. Other health professional bodies require specific qualifications from an applicant. For EMA, however, an applicant is hired and licensed by the Commission only to fill a vacancy, and only after satisfying the hiring requirements and qualifications set out in Part 3 of the HEA Regulations.

The Board notes that these unique characteristics are reflected in the HEA. Further, the Board is of the view that the current regulatory structure which involves both the Board and the Commission as employer, is the most effective way to ensure optimum delivery of ambulance services in the public interest.

Finally, the Board notes that although Ontario adopted umbrella legislation for health professions, ambulance services there continue to function under separate legislation.

4. The Council's Conclusion Regarding Designation

In the Council's view, the unique features of the profession of EMA, including the nature of the services provided and the public interest as reflected in reports of previous studies regarding this profession, justify the retention of a separate statute.

Unlike the other professions subject to the legislative review, the profession is not self-regulating and thus is not well suited to the structure under the HPA which is clearly intended for self-regulating professions. There is no need for a college, and many of the accountability mechanisms set out in the HPA are intended for bodies that are independent from, and not part of, government.

The structure that has developed, which is essentially a shared system of regulatory functions between the Commission and the Board, would be difficult to adapt to the HPA model. Under the HPA, a single college is charged with the duty of protecting the public interest, and ensuring that various statutory objects are carried out. In contrast, in the profession of EMA, responsibility for these matters is shared between the Board and the Commission. Further, the Council is persuaded that this structure works well for this profession, and in this regard notes the conclusions of various reports regarding EMA.

Unlike other health professions, the regulatory structure under the HEA provides not only for the regulation of practitioners but also for the mandate of delivery of all ambulance services in the province. An example of this wider mandate is the First Responder Program which was created by the Commission upon the recommendation of the Cain Report. A province wide program was established for police and fire departments to serve as first responders in emergency situations. Because of the strategic location of many departments, police and/or fire fighters are often capable of being the first at a scene of accident or medical emergency. Through the Paramedic Academy at the Justice Institute of B.C., the First Responder Program trains the police and fire fighters in basic first aid treatment and strengthens their role in the "emergency care linkage". In the Council's view, this broader mandate favours the preservation of the present system under the HEA whereby the entire field of ambulance service is effectively regulated by government.

The Council also notes that all practising EMAs are represented by a union, C.U.P.E., Local 873 (the Ambulance Paramedics of British Columbia), and that a process has developed whereby practitioner input is sought on decisions through the bargaining process. An example of this is the creation and development of Standards of Care Committees (SOCC). The SOCCs serve as peer review bodies and review patient care matters that need to be resolved and ensure, through the participation of a physician, that matters involving medical protocol and patient care are appropriately addressed. This kind of working environment differs significantly from the other health professions where typically there are many employers or widespread self-employment.

For these reasons, the Council is of the view that the public interest favours the retention of a separate HEA.

B. DOES THE HEALTH EMERGENCY ACT CONTAIN THE *CORE PRINCIPLES* OF PROFESSIONAL REGULATION?

Schedule A to the Terms of Reference which embodies the Criteria and Guidelines, directs the Council to determine what amendments, if any, are required to the current statute, rules, regulations and bylaws for each profession to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference. In short, the Council must examine, in the event that designation of the health profession under the HPA is not in the public interest, what changes to the health profession statute in issue are necessary to conform to the *core principles* reflected in the HPA and discussed in Schedule B to the Terms of Reference.

Schedule B to the Terms of Reference organizes the *core principles* of professional regulation under five headings:

i. mandate of the regulatory body;

ii. registration requirements for entry into the profession;

iii. quality assurance mechanisms;

iv. complaint and disciplinary process; and

v. accountability mechanisms.

In the Council's view, because of the unique nature of the EMA the *core principles* regarding mandate, registration and accountability mechanisms are not particularly relevant to the profession of EMA. Regarding registration, the Council notes that there is only one employer for EMAs, and all training and licensing is post-employment, thus justifying a unique registration process. Regarding mandate and accountability mechanisms, the *core principles* related to these issues are not well suited to comparison with a profession such as EMA which is not self-regulating.

The Council does however have some concerns regarding the other two categories of *core principles,* quality assurance mechanisms and complaint and disciplinary process. In the Council's view, the *core principles* related to these matters raise important public interest issues for health care practitioners regardless of the regulatory structure.

1. Quality Assurance Mechanisms

Under this heading, schedule B of the Terms of Reference states that there should be effective mechanisms for monitoring practitioner competency including the ability to set continuing education requirements, and that a committee of the board should be responsible for reviewing standards of practice and codes of ethics.

The Council notes that sections 16(2)(d) and (g) [*15.1(2)(d) and (g)*] of the HPA provide that a board's objects include responsibility for standards of practice and ethics. Further, section 16(2)(f) [*15.1(2)(f)*] and Bylaw 18 [*17*] of the HPA establish a patient relations program to prevent professional misconduct of a sexual nature.

Neither of these provisions is contained in the HEA. The Board offers no objection to either issue. The Council is of the view that these matters should be included as specific statutory mandates for the regulatory body for EMA. In the circumstances of the profession of EMA, whereby regulatory responsibilities are shared between the Commission and the Board, the Council believes that both bodies should be consulted about which is best able to fulfil the duties required by these programs.

2. Complaint and Disciplinary Process

A review of the HPA and the principles outlined in schedule B to the Terms of Reference indicates that a designated health profession's complaint and disciplinary process must, at a minimum, incorporate certain key elements:

i. the investigative and adjudicative bodies must be made up of different people and the bodies administered independently;

ii. dissatisfied complainants and registrants must be afforded rights of appeal;

iii. the process must be consistent with the rules of natural justice, and provide for proper notice of a proceeding and a right to be heard; and

iv. the process must not be complex: complainants and registrants must understand how the process works.

With these principles in mind, the Council asked the Board several questions about its complaint and disciplinary process, and after reviewing the responses, notes the following concerns:

1. The Council has a concern about the general framework of the complaint and disciplinary process found in the HEA. It appears that the Board receives the complaint at the initial stage, or the Board may on its own initiative commence a complaint, pursuant to section 7 [*5.2(1)*] of the HEA. At the same time, after a complaint has been referred by the Board to the Investigation Committee, which may feel that a hearing is recommended, the complaint is again referred to the Board which is then responsible for the conduct of a hearing. These steps are embodied in the HEA Regulations, specifically sections 3(b), 4 and 5.

The Board states that its procedure is advantageous in that it is designed to accomplish all required objectives of an effective complaint process. It believes that the creation of additional committees would simply add costs without adding benefits. Further, the Board claims that the investigative and adjudicative functions are separate under the HEA. It states that the initial complaint review by the Board is based only on the complaint itself and does not include any detailed evidence supporting or refuting the complaint.

In the Council's view, the investigative and adjudicative functions under the HPA are not sufficiently separate. Under the HPA, the investigative and adjudicative bodies must be made up of different persons and the bodies must be administered independently. The fact that the Board as the initial recipient of a complaint limits its findings within the four corners of the complaint does not validate the process presently set out in the HEA. The fact remains that the same persons on the Board - which consists of three individuals - are the ones that receive or initiate a complaint *and* adjudicate upon it after it has undergone scrutiny by the Investigation Committee.

In summary, the Council feels that the present mechanism of the complaint and disciplinary process in the HEA is flawed as regards the overlapping investigative and adjudicative functions within the Board. The Council notes that the Board offers no objection to clarifying the roles played by the Investigation Committee and the Board, provided that there are no unnecessary costs without new benefits. The Council appreciates these concerns but believes that the necessary separation can be achieved without significant disruption. Specifically, the Registrar of the Board could be given the initial screening function, thus preserving the impartiality of the Board.

2. The Council asked the Board about sections 34(1) and (2) [*33(1) and (2)*] of the HPA which provides that the inquiry committee must report to the board in all cases where it decides not to refer the matter to the discipline committee and which gives the complainant a right to appeal such decision to the Board. The Board replies that as part of standard practice, it is advised of the status of each complaint once the

Investigation Committee has completed its findings on a complaint. Although the Board does not object in principle to these HPA sections, it maintains that the complainant's right to appeal such a decision should be to the Investigation Committee because the Board would be biased should a hearing on the matter subsequently be commenced.

The Council believes that complainants should be granted some form of internal appeal regarding dismissed complaints, and accepts the Board's concession - that granting the right to appeal to the investigation committee would be appropriate.

3. The Council inquired whether the Board makes its hearings open to the public. The Board points out Rule 9 which empowers the Board to conduct a private hearing if the complainant or respondent so requests or if the Board feels that it is more appropriate to hold a private hearing. In the Council's view, the scope of this provision is too broad. The Council believes that the *core principles* require that hearings of an adjudicative nature must generally be open to the public, with specific exceptions providing for precise grounds for holding the hearings in private. Such a provision is embodied in sections 12(5) [*11(3)*] of the HPA Bylaws.

4. Finally, the Council notes that the Board offers no objections to the adoption of the following HPA provisions:

i. section 33(4) [*32(4)*] of the HPA which deals with the inquiry committee's power to take any action it considers appropriate to resolve a complaint, including mediation;

ii. section 36 [*35*] of the HPA which provides that the inquiry committee may resolve complaints by way of registrants' undertakings or consents;

iii. section 37 [*36*] of the HPA which describes the contents of a citation;

iv. section 38 [*37*] of the HPA which sets out the procedure for a discipline committee hearing; and

v. section 40 [*39*] of the HPA which provides for an appeal by a person aggrieved or adversely affected by a decision of the discipline committee.

3. Summary Regarding Health Emergency Act *Core Principles* of Professional Regulation

After a careful review of the HEA and Rules, the Council is of the view that the legislation regarding the profession of emergency medical assistance is for the most part consistent with the *core principles* of professional regulation. However on some important issues, notably those related to quality assurance mechanisms and the complaint and disciplinary process, the Council found several provisions to be inadequate, incomplete or missing.

Therefore, the Council recommends that changes to the HEA be made in accordance with the Council's suggestions regarding quality assurance mechanisms and the complaint and disciplinary process discussed at p. 12 to 15 of this report. In the Council's view, these changes are necessary in order to ensure that the HEA is consistent with the *core principles* of professional regulation embodied in the HPA and set out in Schedule B to the Terms of Reference.

D. RECOMMENDATION

The Health Professions Council recommends to the Minister of Health and Minister Responsible for Seniors that the Health Emergency Act be retained. The Council also recommends that the Health Emergency Act be amended to include the suggested changes discussed in this report.

Appendix: The Terms of Reference and the Criteria and Guidelines.

For the Appendix *Terms of Reference and Guidelines*,
please refer to the Appendix in Part II, Volume 1 – Legislative Review

HEALTH
PROFESSIONS
COUNCIL

MEDICAL PRACTITIONERS ACT
LEGISLATIVE REVIEW REPORT (PRELIMINARY)

August 1998

FOREWORD

This report is the result of the Health Professions Council's legislative review of the Medical Practitioners Act pursuant to the Terms of Reference from the Minister of Health and Minister Responsible for Seniors. Under the Health Professions Act, the Health Professions Council is a six person advisory body appointed by the Government of British Columbia to make recommendations to the Minister of Health and Minister Responsible for Seniors about the regulation of health professions.

In this report the Health Professions Council examines two issues:

(1) whether designation of the profession of medicine under the Health Professions Act would be in the public interest or whether there are unique features of the profession, or other relevant factors, that justify a continuing need for a separate statute; and

(2) what amendments, if any, are required to the current statute, rules, regulations and bylaws for the profession of medicine to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the Health Professions Act and discussed in Schedule B to the Terms of Reference.

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EXECUTIVE SUMMARY

The Health Professions Council has conducted a comparative analysis of the Medical Practitioners Act with the Health Professions Act.

After reviewing the analysis and considering the *core principles* of professional regulation embodied in the Health Professions Act and discussed in the Terms of Reference, the Health Professions Council makes the qualified recommendation that designation of the profession of medicine under the Health Professions Act would be in the public interest, provided the Health Professions Act is amended to provide for improvements identified in this report. In the Health Professions Council's view, the general policy favouring designation and the lack of compelling reasons justifying a separate statute support its recommendation that designation is in the public interest. However, should the Medical Practitioners Act be retained as a separate statute the Health Professions Council recommends that it be amended to address the deficiencies the Health Professions Council has noted in this report.

MEDICAL PRACTITIONERS ACT LEGISLATIVE REVIEW REPORT (PRELIMINARY)

I. INTRODUCTION

This is the preliminary report of the legislative review of the Medical Practitioners Act (the MPA) conducted by the Health Professions Council (the Council).

The review was conducted pursuant to the Terms of Reference issued by the Minister of Health and Minister Responsible for Seniors in accordance with section 24, now section 25 of the Health Professions Act (the HPA).[1]

The Terms of Reference direct the Council to review the governing statutes for each of ten health professions, of which medicine is one.

A. THE NATURE OF THE REVIEW

The purpose of the review as set out in the Terms of Reference is twofold:

(a) To determine whether designation of the profession under the HPA would be in the public interest or whether there are unique features of the profession, or other relevant factors, that justify a continuing need for a separate statute.

(b) To determine what amendments, if any, are required to the current statute, rules, regulations and bylaws for each profession to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference.

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[1] During the early drafting of this Report statute references were based on RSBC 1979 and Amendments. For ease of reference, the old provisions are indicated in brackets next to the current citations. The current versions refer to the Health Professions Act, RSBC 1996, Chapter 183, and the Medical Practitioners Act, RSBC 1996, Chapter 285.

The Council's primary task in conducting the legislative review is to determine whether it is in the public interest that a health profession be designated under the HPA. The analysis of whether the professional statute contains the *core principles* of professional regulation is an important element in the consideration of whether designation is in the public interest. The extent to which a professional statute currently embodies these *core principles* is clearly one of the factors the Council must consider in making this determination.

However, the *core principle* analysis is not the only factor that must be considered. The Terms of Reference reflect a general policy that designation under the HPA is the favoured option. They refer to the desirability of minimizing the number of statutes that govern the health professions and the importance of a high degree of consistency among statutes. The Terms of Reference also direct the Council to consider specifically whether there are unique features of a health profession or other relevant factors that **justify** a separate statute. Thus, the onus is on the profession to establish why a separate statute is in the public interest.

In summary, in determining whether a profession should be designated under the HPA the Council must consider, first, the extent to which the current professional statute embodies the *core principles* of professional regulation and, second, whether there are unique features about the profession or other relevant factors that justify the retention of a separate statute.

B. THE PROCESS FOR THE REVIEW

The general process for the review provides for an initial meeting with the profession, preparation by the Chair of the Council of a comparative analysis of the profession's current statute with the HPA, discussion of the analysis with the profession, drafting of a preliminary report, discussion of the preliminary report within the Council, consultation meetings and a final report.

The Council Chair met with representatives of the College of Physicians and Surgeons of BC (the College) and the BC Medical Association (the BCMA) on May 15, 1995, to discuss the review process.

The Chair then completed the comparative analysis of the MPA and the HPA, and in a letter dated February 20, 1996, provided the College and the BCMA with a detailed analysis of the MPA. The BCMA and the College were asked to provide responses to a number of questions and to describe the unique features of medicine, or any other relevant factors, that justified the retention of a separate statute. The College provided detailed submissions in response to the Council's inquiries, while the BCMA indicated its agreement with the College's submission.

The Chair then completed this preliminary report which will be circulated to all health professions and other interested parties upon request.

C. THE MEDICAL PRACTITIONERS ACT

The legislative history of the profession of medicine includes several enactments, amendments, repeals and consolidations over a range of one hundred years. The first provincial enactment for medicine was The Medical Ordinance, 1867, c.88. It was repealed in 1886 by the British Columbia Medical Act, 1886, c.13. Several amendments and consolidations took place until 1898, when the Medical Act, 1898, c.9, replaced prior statutes, and established the College of Physicians and Surgeons of B.C. That Act also made it unlawful for unregistered persons to practise medicine. The Medical Act, 1909, c.6, provided, for the first time, a definition of the practice of medicine. In 1921, the Medical Act Amendment Act, 1921, c.38, provided for the registration of chiropractors and drugless physicians under the Act.

The Medical Act Amendment Act, 1966, c.26, introduced several changes to the professional statute: among others the definition of "registrar"; a provision for registration of homeopaths; a provision for immediate suspension of a member by the inquiry committee pending final determination by the council of disciplinary matters; and the amendment of the provision dealing with members suffering from a mental condition.

Numerous changes took place during the decades of the 1970s and 1980s. Among these were a 1970 amendment which repealed the prohibition against medical corporations and a 1974 amendment which expanded the exceptions to the prohibition against the practice of medicine by unregistered persons to include emergency medical assistants and optometrists. A 1978 amendment included a change to the provisions to adopt the Good Samaritan Act, 1978, c.10. A 1979 amendment introduced the possibility of suspending a member from practice pending the conclusion of a disciplinary hearing, if it was considered desirable to protect the public. In the same year, the profession-specific statute was renamed the Medical Practitioners Act.

In 1993, pursuant to the Health Professions Statutes Amendment Act, SBC 1993, c.50, amendments were made to include the present duties and objects clause and enhanced inspection powers. Finally, in 1994, the Medical Practitioners Amendment Act, SBC 1994, c.11, introduced changes to update procedural matters concerning complaints of sexual misconduct.

disciplinary hearing, if it was considered desirable to protect the public. In the same year, the profession-specific statute was renamed the Medical Practitioners Act.

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II. DISCUSSION OF ISSUES

The Council's primary focus in conducting this review is to determine whether designation of the profession of medicine under the HPA would be in the public interest, and a key element of this task is to determine whether the MPA contains the *core principles* of professional regulation reflected in the HPA and discussed in the Terms of Reference.

This report considers first, whether the MPA contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference, and second, whether there is a need for a separate statute.

A. DOES THE MEDICAL PRACTITIONERS ACT CONTAIN THE *CORE PRINCIPLES* OF PROFESSIONAL REGULATION?

Schedule B to the Terms of Reference organizes the *core principles* of professional regulation under five headings. The following section discusses each of the headings in turn.

1. Mandate of the Regulatory Body

Schedule B of the Terms of Reference emphasizes two issues under this heading:

i. barriers to interdisciplinary practice are not in the public interest; and

ii. it is important that there be a clear separation between the professional association and the regulatory body.

Both of these points were discussed by the Seaton Commission in its report "Closer to Home". Regarding interdisciplinary practice the Commission stated:

> *In addition to broadly stated scopes of practice, there are other barriers to practice. For instance, there is no reason why a member of one profession should not be allowed to be a member of another profession. A provision in any regulation, rule, by-law or Code of Ethics which prevents this from happening is inappropriate. It may be in the profession's interest to have such a prohibition, but it is not in the public interest.*

> *Some of the existing professional legislation makes it an offence for a member of a college to work in association with someone who is not a member of that college. But as long as the non-member does not practice within the profession's narrow scope of practice, the commission does not believe there is any substantial reason why a member of a college should not be allowed to work in cooperation or partnership with someone who is not a member. In fact, a multi-disciplinary practice may be beneficial and should be encouraged.*

The Council agrees with these comments about interdisciplinary practice.

With respect to the relationship between the regulatory body and the professional association, the Seaton Commission recommended that two separate bodies be created for all regulated and licensed professions so that there is a clear separation of membership promotion functions and licensing and discipline functions. The Seaton Commission felt that without this separation the public protection function of the College would become blurred with the membership promotion function of the professional association.

The Seaton Commission's views echo those of an earlier Report into health care entitled "Health Security for British Columbians, Special Report: Consumer Participation, Regulation of the Professions, and Decentralization" (the Foulkes Report). In a chapter on public regulation and the professions, Professor J.T. McLeod stated:

> *It is only reasonable to recognize that professions, like other groups and individuals in society, may well be expected to have certain private self-interests of their own which are not coincident with the public interest. Recognition of a degree of real or at least potential conflict between the private interest of the profession and the public interest is the root of the necessary distinction between the professional or licensing body on the one hand, whose purpose is to enforce standards of quality and service, and the voluntary association of the profession on the other hand, whose legitimate function is to advance the particular interests of the profession and its membership. This important distinction between the public function of the licensing body and the private function of the voluntary association is now widely recognized in Canada. From the standpoint of both the professions and the public, it is desirable that the separation of the two functions be kept sharp and distinct.*

It is important that there be a clear separation between the professional association and the regulatory body.

With these comments in mind, the Council notes the following regarding the *core principles* related to the mandate of the regulatory body.

1. Section 93(1) [*84(1)*] of the MPA makes it an offence to practise medicine in partnership with a non-member, except with a midwife, unless the written consent of the Executive Committee is first obtained. On its face, the provision is contrary to the statement of the Seaton Commission, referred to above, in that there is no substantial reason why a member of a college should not be allowed to work in cooperation or partnership with someone who is not a member. Section 93 [*84*] of the MPA was reproduced in that portion of the Seaton Commission's report which contained this statement. The corresponding legislation in Ontario contains no similar prohibition.

The College responds to the Council's concerns as follows:

> *The College's position, in accordance with its mandate to protect the public, is that its members are accountable for health care services provided in a facility with which the physician is involved. The College obviously has no ability to influence the standards of other professions and accordingly it is important for it to be able to influence the nature of associations entered into by its members. In so doing, the College accepts responsibility for ensuring that the medical care provided by such "associations" is consistent with the standards required of the medical profession and is conducive to appropriate medical care. In our view, our position does not create unnecessary barriers to interdisciplinary practice but does establish appropriate safeguards which are in the public interest.*

The College's concerns regarding such associations are based on two issues, conflict of interest and standards of practice. With respect to conflict of interest, the College states:

> *Physicians should not profit directly or indirectly from such referrals. For this reason, the College looks carefully at the details of the proposed association to ensure that the association is at arm's length, and that the physician does not profit directly or indirectly by referring his/her patients to the partner or associate.*

With respect to standards of practice, the College states:

> *There are other health practitioners who operate from a different philosophical premise and offer alternate approaches to health care based upon hypotheses which the medical profession finds incompatible with and contrary to its standards. The approaches adopted by other health*

> *practitioners are of course their prerogative. Similarly, it is the public's prerogative to seek the services of such practitioners. In our view, they should do so with a full understanding of the credentials of the practitioner and the premise of the treatment. In our submission, it is the College's prerogative, in fulfilling its mandate, to ensure that its members meet appropriate standards and practise in a manner consistent with those standards.*

While the Council appreciates the concerns the College is attempting to address through this provision, the powers this section creates, and the severe remedy provided, go beyond what is necessary to achieve the aims of the section. As the Seaton Commission noted:

> *...as long as the non-member does not practise within the profession's narrow scope of practice, the Commission does not believe there is any substantial reason why a member of a college should not be allowed to work in cooperation or partnership with someone who is not a member.*

As long as the member meets the appropriate standards the Council sees no substantial reason for the barriers. The College states that it must ensure that professionals who practise with physicians practise in a manner consistent with the College's standards. However, this section provides an outright ban on such associations, subject only to the College's approval. Thus, the primary assumption is that such associations are not in the public interest. In contrast, the Alberta College of Physicians and Surgeons has a policy on associations which provides, essentially, that such associations are permitted as long as the associating or referring physician is satisfied that the services of the other health professional can be expected to benefit the patient and not cause harm.

Further, the code of ethics of the Canadian Medical Association to which all members are subject deals with financial arrangements in sections 45 and 46, which provide that physicians:

> ***45.*** *will avoid any personal profit motive in ordering drugs, appliances or diagnostic procedures from any facility in which the physician has a financial interest;*
>
> ***46.*** *will refuse to accept any commission or payment, direct or indirect, for any service rendered to a patient by other persons excepting direct employees and professional colleagues with whom there is a formal partnership or similar agreement.*

The Council's primary concern with section 93 [*84*] of the MPA is that broadly applied, it can create unnecessary barriers to the practice of other regulated health professions. For example, the Council has been provided with information that the College has used this section as a means to restrict access to diagnostic facilities, which it controls through the MPA and its Rules. The College takes the position that diagnostic testing is the practice of medicine, requiring supervision by licensed physicians. That position, in conjunction with section 93 [*84*] has led the College to restrict access by non-members, such as naturopathic physicians and chiropractors, to diagnostic facilities. It is important to note that the College is responsible for accrediting both private and public diagnostic facilities.

In short, the broad prohibition created by this section is not in the public interest, as it has the potential to create unnecessary barriers to interdisciplinary practice.

2. The Council requested further information about section 81(1) [*72(1)*] of the MPA which creates an offence for practising medicine while unregistered or while suspended from practice, and section 81(2) [*72(2)*] which gives the definition of the practice of medicine.

The College states that the purpose of this section is not to protect the practice of medicine but rather is an attempt to ensure that there is a legal mechanism available to prohibit practices which are or could be harmful to the public interest and safety.

The Council notes that this section is the cornerstone of the traditional model of regulating scopes of practice which is based on exclusivity. The Terms of Reference for the Council's ongoing scope of practice review provide the parameters for a new system of regulating scopes of practice, one based on non-exclusive scope of practice statements and narrowly defined reserved, or harmful acts. In other words, the end result of the Council's scope of practice review will be a new regulatory system for what the College describes as "*prohibiting practices which are or could be harmful to the public interest and safety.*" These issues are currently the subject of more detailed consideration in the Council's scope of practice review. However, for the purposes of the legislative review process, it is important to note that the new model will require the repeal of broad prohibitions such as that set out in section 81(1) [*72(1)*] of the MPA.

3. Rule 104 of the MPA relates to non-hospital medical surgical facilities and rule 121 of the MPA governs diagnostic facilities. The Council believes that it is inappropriate to give exclusive power of governance over such facilities to medical practitioners as it has the potential to create unnecessary barriers to interdisciplinary practice.

The primary concern with these rules is the degree of control it gives to the College in regard to the performance of services within such facilities. Both rules provide that the directors of such facilities must be physicians, and in conjunction with a broad interpretation of section 93 [*84*] of the MPA, such a rule could severely restrict access to such facilities, particularly laboratory facilities, by complementary practitioners. With regard to non-hospital medical-surgical facilities, the College states:

> *Prior to the institution of this program, this was an area which was unregulated. The College considered it part of its mandate, in the public interest, to assure the public that these facilities provide quality care. The College accepts its mandate to regulate the practice of medicine, and such regulation includes determining that the facility, where medicine is practised, allows the physician to provide safe and effective treatment.*

Similarly, the College states that diagnostic testing constitutes the practice of medicine and as such the College must be responsible for ensuring that the proper standards of practice regarding competence and conduct are followed.

There is no doubt that the College provides a valuable service in regulating and accrediting such facilities, and ensuring that practice within such facilities is conducted safely and effectively. However, the Council does not believe it is in the public interest for the College to have full control over the regulation of such facilities, including the ability to determine who practises within them.

The issue of laboratory facilities was also addressed by the Seaton Commission which stated, in part:

> *The Medical Services Commission has generally interpreted the Medical Services Act and the Medical Practitioners Act to mean that only physicians may own laboratories. But we can find nothing in the Medical Services Act to support this interpretation. A non-physician is quite capable of managing the daily operations of a laboratory, and that is, in fact, what happens at present. A pathologist must be available to provide clinical expertise as required. But we believe that laboratories are, in reality, business enterprises, and should be treated as such, rather than as medical practices.*

The Council agrees with these comments.

The Council wishes to emphasize that it is not to be taken as stating that all health professionals should be given access to laboratory facilities. That is a complex question which requires consideration of many factors, including scope of practice, training and education and likely a financial analysis by the Medical Services Commission. At this point, the Council is simply commenting that in its view, the College should not have exclusive control over such facilities. Perhaps the solution is that the College should still administer an accreditation program while the government, possibly through the Medical Services Commission, maintains final decision-making power regarding access to such facilities.

4. Section 99(2) [*93(2)*] of the MPA gives the College Council and the Minister of Education the power to approve schools intending to offer programs in medicine or surgery. The College submits that this provision is in the public interest since it is the body most competent to determine satisfactory standards in training or instruction in medicine or surgery. It states:

> *The College, through its knowledge of and involvement in existing accreditation processes, and through the professional expertise which it is the most able to identify and mobilize, is the body most competent to determine whether training or instruction in medicine or surgery meets the standards required to protect the public and serve the public interest.*

Section 99 [*93*] of the MPA states:

> ***Instruction in medicine prohibited***
>
> *99 (1) In this section **"instruction in medicine"** means instruction in doing a thing mentioned in section 81 (2) (b), (c), (d) or (e).*
>
> *(2) A person, other than the college, must not carry on in British Columbia a school, college or other institution for training or imparting instruction in medicine or surgery without the consent of the council and the Minister of Education, Skills and Training.*
>
> . . .

Section 81(2) [*72(2)*] of the MPA states:

> ***Practising by unregistered persons an offence***
>
> *81 (2) For the purposes of and without restricting subsection (1), a person practises medicine who does any of the following:*

. . .

> (b) *diagnoses, or offers to diagnose, a human disease, ailment, deformity, defect or injury, or who examines or advises on, or offers to examine or advise on, the physical or mental condition of a person;*
>
> (c) *prescribes or administers a drug, serum, medicine or a substance or remedy for the cure, treatment or prevention of a human disease, ailment, deformity, defect or injury;*
>
> (d) *prescribes or administers a treatment or performs surgery, midwifery or an operation or manipulation, or supplies or applies an apparatus or appliance for the cure, treatment or prevention of a human disease, ailment, deformity, defect or injury;*
>
> (e) *acts as the agent, assistant or associate of a person in the practice of medicine as set out in paragraphs (a) to (d).*

Thus, section 99(1) [*93(1)*] is necessarily tied up with section 81(2) [*72(2)*] which defines the scope of practice of medicine.

In the Council's view, a regulatory body's role in approval of educational programs should be limited to approval for the purposes of registration, such as is provided in rule 74 under the MPA. The effect of section 99(1) [*93(1)*], as currently worded, gives the College the power to determine whether a school can exist at all, and this goes beyond the proper role of a regulatory body. This is particularly so in the case of medicine as the broad definition of medicine would include training and education in many tasks and services which are performed not only by members of the College but also by members of auxiliary professions. Section 99(1) [*93(1)*] of the MPA should be clarified to clearly confine its application to approval of schools and educational programs for the purposes of determining eligibility for registration with the College.

The Council notes that for the purposes of registration, there already exist national accrediting bodies such as the Committee on Accreditation of Canadian Medical Schools for the approval of undergraduate programs in Canadian medical schools and the Royal College of Physicians and Surgeons of Canada which administers postgraduate residency training programs.

5. The Council asked the College about section 52 [*51*] of the HPA which provides that a board may apply to the Supreme Court for an interim or permanent injunction

to restrain a person from contravening the Act, the regulation or its bylaws. The College prefers not to have a similar provision in the MPA. The College states that since 1984 it has deferred to the Attorney General in regard to prosecutions regarding practice by unregistered persons.

The Council has in previous legislative review reports dealt with the same issue. The podiatrists, registered nurses and chiropractors have no objection to an injunction power to protect the public from registrants who have violated, are about to, or currently violate, the Act, regulations or bylaws. The Council considers this to be an important public protection measure which should be included in the professional statute.

However, the College makes an important point regarding provisions like section 52 [*51*] of the HPA. It states:

> *Prior to 1984, when the College sought to prevent the practice of medicine by unregistered persons, some people expressed concern that it was "self-serving" and perceived as "turf protection". Consequently, recognizing such concerns, we have a strong objection to including such a provision in our legislation.*

The Council notes that section 52 [*51*] of the MPA is not specifically directed at preventing the practice of medicine by unregistered persons. However, the issue of enforcement, particularly in regard to performing services which should only be carried out by registered health professionals, needs to be clarified. Specifically, clarification of enforcement powers should be provided in the HPA. It must be clear whether the College has the power to apply for an interim or permanent injunction or whether this procedure is best left to the discretion of the Attorney General, as has been the practise of the College since 1984, with respect to unregistered persons practising medicine. The Council would welcome further submission on this issue.

6. Finally, the College has no objection to the inclusion of the HPA provisions regarding incorporation provided that incorporation does not affect the responsibilities of registrants. However, the College does object to the section regarding the power of Cabinet to make bylaws regarding incorporation. That issue will be dealt with in the section "Accountability Mechanisms".

2. Registration Requirements for Entry into the Profession

Schedule B to the Terms of Reference makes three important points under this heading. First, natural justice and fairness must be reflected in the admission criteria and application process for newly graduated and foreign trained applicants. Second, there must be objective requirements for registration and accreditation of education programs. Third, applicants should have appropriate rights of appeal affecting registration decisions.

In considering this issue, the Council was satisfied that the process set out in the MPA, for the most part, satisfied the *core principles*. However, the Council had some concerns regarding the registration process.

1. The Council requested clarification from the College regarding various registration criteria set out in the MPA. For example, section 34(b) [*31*] of the MPA requires that registrants be of "*good character as a citizen*". "Good character" does not appear in the HPA but is included in section 47(1)(d) of the current HPA draft Bylaws.

The College submits that this provision is in the public interest as it ensures that only persons of good character are registered with the College. The concern is that this provision may violate one of the *core principles* discussed under registration requirements - namely that requirements for registration must be objective. A term such as "good character" injects a significant degree of subjectivity into the decision making process. Nonetheless, after considering the submissions of the College, the Council recognizes the need for such a provision and is satisfied that it does not violate the *core principles* of professional regulation. Indeed, the notion of "good character" is well established in many other professional regulatory regimes.

However, with respect to citizenship requirements the College believes that such issues are best left to the determination of other government agencies such as the federal Immigration Department. Accordingly, this requirement under rule 73(b) of the MPA Rules should be deleted.

2. The Council requested further information about the appeal process from a refusal of registration. Under section 20(4) [*19(3)*] of the HPA, a dissatisfied applicant is given a right of appeal to the Supreme Court. Sections 41 and 43 [*38 and 40*] of the MPA provide a right to an internal appeal from a refusal of registration and there is no external appeal from a refusal of registration. In the Council's view, an external appeal to the Supreme Court should be made available to an applicant whose application for registration is refused.

3. Quality Assurance Mechanisms

Under this heading, schedule B of the Terms of Reference states that there should be effective mechanisms for monitoring practitioner competency including the ability to set continuing education requirements, and a committee of the board should be responsible for reviewing standards of practice and codes of ethics.

In its submission, the College has outlined in detail the several mechanisms it employs for satisfying this *core principle*. For example, the College notes the following committees and their respective functions:

> *The Preliminary Review Committee and the Sexual Misconduct Review Committee (see rules 146-153 and 154-161), the Quality of Medical Performance Committee (see rules 162-171) and the Executive Committee are responsible for the review of all serious complaints pertaining to the quality of practice and unprofessional and unethical practice.*
>
> *The Ethical Standards and Conduct Review Committee (see rules 162-171), and Council are responsible for the review of professional ethics and, where appropriate, liaise with the Canadian Medical Association which authored the Code of Ethics endorsed by this College and others across Canada and which is currently under review by that Association with input from provincial Colleges.*
>
> *The Committee on Office Medical Practice Assessment (rules 88-97) reviews standards of practice and performance of members with a view to enhancing the same.*
>
> *The Practice Guideline Committee develops, reviews, publishes and promotes clinical practice guidelines for physicians.*

Although many of the procedures do not necessarily mirror those of the HPA the Council is satisfied that the College is in compliance with the *core principle* of Quality Assurance Mechanisms.

On the issue of mandatory continuing education the College states:

> *With respect to mandatory continuing education, there is considerable evidence that this does not significantly alter the actual performance of physicians. We would be pleased to provide copies of literature which support this view. In addition, the available mandatory continuing education does not always match the needs of the physician. Rather than mandating participation in specific medical education activities, the College has elected to do evaluations of physicians' actual performance in practice. Programs such as the Office Medical Practice Assessment Program (see rules 88-97) and the Triplicate Prescription Program, which*

monitors the use of narcotics, are examples of such evaluation of performance.

The Council tends to agree with the College's comments about mandatory continuing education, and believes that continuing education is only part of the process of ensuring quality practice. In any event, the *core principle* regarding quality assurance merely states that there should be the ability to set education requirements, it does not require that they be imposed on a mandatory basis.

4. Complaint and Disciplinary Process

A review of the HPA and the principles outlined in schedule B to the Terms of Reference indicates that a designated health profession's complaint and disciplinary process must, at a minimum, incorporate certain key elements:

i. the investigative and adjudicative bodies must be made up of different people and the bodies administered independently;

ii. dissatisfied complainants and registrants must be afforded rights of appeal;

iii. the process must be consistent with the rules of natural justice, and provide for proper notice of a proceeding and a right to be heard; and

iv. the process must not be complex: complainants and registrants must understand how the process works.

In reviewing this section, note that the formal adjudicative body under the MPA is called the "inquiry committee" while under the HPA it is known as the discipline committee. Under the HPA, the "inquiry committee" is the investigative body. Also, under the MPA, the College's primary regulatory body is the "College council" while under the HPA, this body is known as the "board".

The general process for reviewing complaints under the MPA is complex, and depends on the nature of the complaint. In the first instance, all complaints are referred to the registrar or deputy registrar. The registrar has the power to deal with "minor" complaints without referring them to a committee. The registrar also has the power to conduct preliminary investigations, and is empowered to refer complaints to one of five bodies: The Quality of Medical Performance Committee, the Ethical Standards and Conduct Review Committee, the Preliminary Review Committee, the Executive Committee, or to the College council.

The MPA also establishes a special deputy registrar who deals with complaints regarding sexual misconduct. There is also a special committee - the Sexual Misconduct Review Committee - which is responsible for reviewing the deputy registrar's investigations and recommendations. That committee is empowered to refer the matter to the inquiry committee for formal disciplinary hearings.

Although not specifically stated in the MPA or its Rules, it appears that when matters which may warrant a formal disciplinary hearing are identified, they are referred to either the Preliminary Review Committee or the Sexual Misconduct Review Committee which have the power to recommend that formal disciplinary hearings be undertaken. In contrast, for less serious matters, which the College has identified as "*complaints with respect to misunderstood treatments, or misunderstandings in communication, and complaints which turn out to be frivolous and vexatious*", the matters are either dealt with by the registrar or referred to the Quality of Medical Performance Committee or the Ethical Standards Review Committee.

Each of the committees has various powers for dealing with complaints. The Preliminary Review Committee and the Sexual Misconduct Review Committee have the power, among others, to recommend that an inquiry be conducted or that no further action be taken. The Quality of Medical Performance Committee and the Ethical Standards and Conduct Review Committee have the power to "investigate" and "adjudicate" complaints as well as the power to refer matters to the Executive Committee or the College council with any recommendation either committee sees fit.

The inquiry committee, created pursuant to section 53 [*50*] of the MPA, is the College's formal adjudicative body. It is responsible for conducting formal disciplinary hearings, and for making findings while the College council, not the inquiry committee, is responsible for setting the penalty.

In addition to the general complaints process under the MPA, there are two other ways in which proceedings may be brought against members of the College. First, under section 51 [*48*] of the MPA, the College council or the Executive Committee may appoint an investigating committee to investigate whether a member has adequate skill or knowledge to practise medicine. The investigating committee then submits a report, after which the College council may suspend or erase the member from the College register. Second, under section 63 [*55*] of the MPA, the Executive Committee may appoint an inquiry committee when it receives a report that a member may be suffering a physical or mental ailment which may, if the member continues to practise, constitute a danger to the public. A similar power is set out in section 64 [*56*] of the MPA where a member is admitted to hospital for treatment of a psychiatric or drug or alcohol disorder.

In contrast, the HPA process is more streamlined. Under s. 33(6)(a) [*32(4)(a)*] of the HPA, all complaints are sent to the registrar, who then refers them to an inquiry committee which must investigate all complaints. The inquiry committee may decide to take no further action because the matter is trivial, frivolous or vexatious or made in bad faith, or relates to conduct or competence that is found to be satisfactory; take appropriate steps to resolve the matter; or, refer the matter to the discipline committee. If the inquiry committee decides not to refer the matter to the discipline committee, under section 34 [*33*] of the HPA, it must report to the board regarding its decision and the results of its investigation and, in cases of complaints, notify the complainant in writing of its decision. The complainant who is dissatisfied with the decision of the inquiry committee may appeal the decision to the board which in turn may refuse the appeal. Also under section 34 [*33*], the board may on its own motion direct the inquiry committee to reprimand the registrant or direct him or her to take a remedial action by consent, or refer the matter to the discipline committee.

Under sections 37 and 38 [*36 and 37*] of the HPA, the discipline committee must issue, upon direction by the inquiry committee or the board, a citation regarding the complaint and hear and determine the matter. The hearing must be in public unless the complainant or the respondent requests an *in camera* hearing or the discipline committee is satisfied that a private hearing is appropriate under the circumstances. Section 39 [*38*] of the HPA empowers the discipline committee to dismiss the complaint, reprimand the respondent, impose limits or conditions on the practice of the respondent, suspend or cancel the registration of the respondent, or fine or assess costs or part of the costs of the hearing against the respondent. Section 40 [*39*] of the HPA entitles a person aggrieved or adversely affected by the order of the discipline committee to appeal the matter to the Supreme Court. The decision of the Supreme Court is appealable to the Court of Appeal if leave to appeal is granted by a justice of the Court of Appeal.

The Council has conducted a detailed review of the complaint and disciplinary process under the MPA with that of the HPA in light of the *core principles* of professional regulation. In the result, the Council has the following concerns about the process under the MPA.

1. Sections 33(5) and (6) [*32(3) and (4)*] of the HPA provide that the inquiry committee must notify the registrant of a complaint and provide him or her with an opportunity to provide information about the complaint. Further, the inquiry committee is required to consider this information. The College states that these rules are currently provided for in its Rules, and in particular rule 177 which requires that members co-operate with the College in its review of any matter. Although it may be the College's practice to follow these procedures, there is no specific requirement that any of the committees contact the registrant and provide an opportunity to respond.

In any event, under the MPA it is the registrar and his or her staff that is responsible for the majority of investigations and there are no express requirements regarding the conduct of such investigations. In the Council's view, the MPA is deficient with respect to the process for complaint investigations.

2. Section 34(2) [*33(2)*] of the HPA provides a complainant with a right to an internal appeal regarding decisions not to refer a matter to the disciplinary committee. Under the MPA Rules, the only committees which provide for a review of such decisions are the Preliminary Review Committee and the Sexual Misconduct Review Committee, and that review is only a right to make further representations to the committee itself. There is no such right with regard to decisions of the Quality of Medical Performance Committee or the Ethical Standards Review Committee, nor is there such a right with respect to decisions by the registrar's staff to take no further action. The College states that, in practice, complainants who are unhappy with decisions of the registrar's staff are given the right to request a review of the decision by the "*appropriate committee*", and that this is "*usually*" communicated to complainants when they are informed of the decision. Regardless of the practice the College may follow, it is far from clear whether there is a right to an internal appeal, and such right is not clearly set out in the MPA or its Rules.

3. Part III of the HPA clearly separates the investigative and adjudicative functions, and bylaw 15(3) now bylaw 64(1) of the HPA prohibits members of the discipline committee from hearing matters in which they were involved as part of the inquiry committee. The College states:

> *In all matters which could potentially result in any disciplinary action, the investigation and the discipline adjudicative functions are entirely separate.*

The College also notes that rules 154 and 161 provide that members of the Preliminary Review Committee or the Sexual Misconduct Review Committee are prohibited from sitting on the inquiry committee in respect of matters upon which they have been involved as members of their respective committee.

However, the Council is not satisfied that the investigative and adjudicative functions are entirely separate.

First, the Council notes that the College council, from which members of the inquiry committee are appointed, is also responsible for selecting and appointing the inquiry committee. Further, the College council is the body responsible for determining the penalty to be imposed after a disciplinary hearing. In these circumstances, there is a potential for overlap between the investigative and adjudicative functions and specifically the potential for decisions, on penalty or on whether discipline should be imposed, to be based on information which may not be formally introduced at a disciplinary hearing.

Second, both the Quality of Medical Performance Committee and the Ethical Standards Review Committee are given the power to both investigate and adjudicate complaints. These committees may also refer matters to the College council with any recommendations they see fit, including, presumably, that it be referred to the inquiry committee. This again raises the possibility that decisions may be based on information which may not be formally introduced at a disciplinary hearing.

In summary, the process under the MPA creates the potential for overlap between the investigative and adjudicative functions.

4. Section 38(3) [*37(3)*] of the HPA provides that discipline hearings are open to the public, and gives the committee a broad discretion to hold private hearings. The HPA Bylaws provide criteria for deciding when the committee may exclude persons from the hearing. In contrast, rule 15 under the MPA provides that all hearings or inquiries shall be held *in camera*. The College states that given the extremely sensitive and confidential nature of the matters usually before an inquiry committee, it has been its experience that *in camera* hearings have served the interests of complainants and encouraged their participation in proceedings. The College notes that the issue of *in camera* hearings is currently under review by the College. Open disciplinary hearings must be considered a *core principle* of professional regulation and such a provision should be embodied in the professional statute. HPA bylaw 12(3) now bylaws 12(5) and 23(3) also prescribes a list of several factors to consider in deciding whether a hearing should be held *in camera*. These factors address the College's concern about the sensitivity of such matters.

5. The Council inquired about section 39(1) [*38(1)*] of the HPA which provides that the discipline committee decides the penalty. In contrast, under the MPA the College council determines the penalty after the inquiry committee has made a finding of professional misconduct. The College states that determination of penalty by its council provides a more balanced and consistent approach to the imposition of penalty. The College further states that in contrast to members of the inquiry committee who may only sit on one or two hearings a year, the College council receives all inquiry committee reports and hears legal submissions on penalty with respect to all reports. Finally, the College notes that determinations by the College council are subject to greater public input as it is composed of one-third public representatives. In the Council's view the system under the HPA is the preferred process for determining penalty. The body which conducts the hearing and hears and receives the evidence is best placed to determine the appropriate penalty. While the Council appreciates the

College's remarks regarding consistency, the results of past disciplinary proceedings and the penalties imposed are available to the panel hearing the matter as well as all parties to such hearings. Empowering the College council to make decisions on penalty creates the potential for overlap between the various disciplinary functions as the College council is also responsible, in the first instance, for appointing an inquiry committee. Further, the Council notes that the majority of inquiry committee members are College council members. Therefore, the Council recommends that the decision on penalty be a matter for the committee conducting disciplinary hearings, not the College council.

6. The Council asked the College about section 40 [*39*] of the HPA which provides that "*a person aggrieved or adversely affected by an order of the discipline committee...or the board may appeal the order to the Supreme Court*." In contrast, section 71 [*62*] of the MPA provides that a complainant or a person dealt with under section 60 [*51*] of the MPA may appeal the decision by the inquiry committee. The College objects to giving its council a right of appeal. Since the College council appoints the inquiry committee and determines the penalty on the basis of its report, the College finds it problematic that the College council can appeal the findings of an inquiry committee which it appointed.

The issue of affording the College council a right of appeal from a decision of the inquiry committee would not create a conflict if, as recommended, the College council relinquishes the power to decide penalties to the inquiry committee. Thus, there is no reason why the College council should not be authorized to appeal from a decision by the inquiry committee.

7. The Council inquired about rule 135 of the MPA which empowers the registrar to deal summarily with "minor" complaints. While the Council has proposed, in previous legislative review reports, to enhance a registrar's ability to deal with complaints in a summary manner, it believes that the MPA grants the registrar too broad a role in this regard. The Council's main concern is that the term "minor" is unspecific and subject to widely varying interpretations. The College itself acknowledges that it is impossible and unwise to define such a term. The use of this term creates the possibility that more serious matters may be dismissed at the first instance at the discretion of the registrar. This is particularly troublesome as neither the MPA nor the Rules provide an express right of appeal from the registrar's decision, though the College indicates that such an appeal exists in practice.

In summary, it is not in the public interest for the registrar to have such wide powers to dismiss complaints, particularly when there is no express avenue of appeal. A provision such as section 33(6)(a) [*32(4)(a)*] of the HPA is a better definition of matters which may be dealt with summarily. That section provides that the inquiry committee may:

> (a) *take no further action if the inquiry committee is of the view that the matter is trivial, frivolous, vexatious or made in bad faith or that the conduct or competence to which the matter relates is satisfactory,...*

The Council will be discussing this matter in more detail in the section "Improvements to the Health Professions Act".

8. Section 64 [*56*] of the MPA provides that members who provide care to other members in hospitals or private hospitals in respect of psychiatric or drug or alcohol problems shall provide the registrar with a written report of the diagnosis, particulars of treatment, prognosis and an opinion as to whether the member is fit to practice. The Council's primary concern is for the privacy of the member seeking such treatment, particularly in light of the fact that the section applies regardless of the severity of the condition. Further, the Council notes that section 63(1) [*55(1)*] of the MPA already requires members to submit reports where they believe another member's ability to practice is impaired by a psychiatric condition or a drug or alcohol problem. In response to the Council's suggestion that the treating physician simply provide an opinion on fitness to practice, the College states:

> *It would be woefully insufficient and inadequate for the College to receive only an opinion regarding fitness to practice. The opinion of the attending physician may be influenced by the physician-patient relationship and therefore may lack objectivity.*

The remark demonstrates an incredible lack of faith in the objectivity and professionalism of physicians engaged in the treatment of such conditions. In the Council's view, section 64 [*56*] constitutes an unnecessary infringement of registrants' right to privacy, particularly since section 63 [*55*] of the MPA already provides for reporting of registrants whose ability to practise medicine is impaired.

9. The Council is also concerned about section 51 [*48*] of the MPA. Pursuant to this section, the College council may appoint an investigating committee to investigate whether a member of the College has adequate skill and knowledge to practise medicine. For this purpose, the College council also has the power to require the member to undergo clinical or other examinations and to permit the committee to inspect the member's clinical records and other documents related to the investigation. The Investigative Committee then completes a report and, after holding a hearing on the report, the College council has the power to erase or suspend the member from the College register. In its submission the College states:

> *As you are aware, it can be difficult, even through a disciplinary process, to adequately evaluate a member's skill and competence. A review of the legislation of other Colleges indicates that they are required to pursue disciplinary proceedings if there are concerns regarding competency. The ability to have a statutorily endorsed evaluation of standards of practice which allows the determination of whether a member is competent to practise is a unique provision clearly in the public interest. As a result of the unique aspects of s.48 of the M.P.A., judicial authorities have recognized the distinction between disciplinary and competency processes and decisions. The value of this provision and the weight of judicial precedent would be lost under the H.P.A. Investigative and disciplinary methods are inappropriate for evaluating adequacy of skill and knowledge.*

While the Council recognizes the need for competency and remedial measures, where severe penalties such as erasure from the register and suspension from practice follow the proceeding under section 51 [*48*] of the MPA, it is important that members under investigation have sufficient procedural safeguards.

Essentially, the process in the MPA is similar to the peer review process which is contained in Part XIII of the Rules under the MPA. These Rules, and particularly rule 95 significantly limit the manner in which information gained through such a process may be used against a member. Similarly, in Ontario which has a peer review process, information gathered through such a process, although it may be used as a basis for a formal allegation of professional misconduct, cannot itself be used in the prosecution of the matter. Clearly, such limitations are an attempt to balance the coercive investigatory powers with the member's right to be treated fairly. In the Council's view, this section ought, at a minimum, to set out more procedural safeguards for the member, such as those provided for in the regular inquiry process, or alternatively, provide limitations on the manner in which information gathered through such a process may be used.

10. The Council is also concerned about the procedures regarding the College's process for dealing with fitness to practise issues. The process is set out in section 53 [*50*] of the MPA. The process is generally initiated by members who report that another member's ability to practise medicine is affected by an emotional, mental or addiction problem. Once the report is received, the Executive Committee may suspend the member who was subject to the report. The inquiry committee is then required to examine the member. However, section 63(5) [*55(3)*] of the MPA provides specifically that the procedural safeguards set out in section 68 [*59*] of the MPA do not apply to the inquiry. In the Council's view, this process does not provide sufficient procedural safeguards for the member, particularly in light of the severity of the College council's

remedial power which includes erasure from the College register.

Sections 62 to 69 of the Health Professions Procedural Code (Schedule 2 of the Regulated Health Professions Act) in Ontario contain a similar program but that they include more detailed procedural safeguards. In Ontario, the executive committee may impose an interim suspension but it must then hold an inquiry, which process is also very similar to the regular disciplinary proceedings and provides greater procedural safeguards than the process set out under the MPA. Under the HPA such matters are currently dealt with through the regular disciplinary process.

While the Council supports the idea of a process for dealing with incapacity or fitness to practice, it believes that the system under the MPA does not provide the necessary procedural safeguards for members.

In the review of the College's response to its analysis of the complaint and disciplinary process, the Council noted several matters upon which the College agrees. They are the following:

1. Section 66 [*57*] of the MPA provides for expeditious inquiries. The Council's primary concern is that the investigative and adjudicative functions may be blended under this process. Although the College states that the process does not blend the investigative and adjudicative functions, it also states that this section can be deleted.

2. Section 53(1) [*50(1)*] of the MPA provides that an inquiry must be convened if three members of the College so request; otherwise, the appointment of an inquiry committee is discretionary. The College acknowledges that member complaints should not be treated differently and that this provision may be deleted.

3. The College indicates that it would not object to a provision such as section 36 [*35*] of the HPA which provides for resolution of complaints through registrant's undertakings or consent. However, the College indicates that it would likely want to expand the provisions of section 36 [*35*] to specifically provide for other remedial steps such as the requirement to consent to psychiatric assessment or other medical examinations, to take counselling with a psychologist or psychiatrist; or agreements to attend educational or remedial programs. This Council will further discuss this issue in the section "Improvements to the Health Professions Act".

4. The College does not object generally to the requirement in section 37(2) [*36(2)*] of the HPA that the College provide 30 days notice of a hearing. However, the College suggests that if such an amendment is made it provide for 30 days notice except in exceptional circumstances which warrant a shorter notice period.

5. The College does not object to a provision such as section 37(4) [*36(4)*] of the HPA which provides that the inquiry (investigative) committee or the board may direct the registrar to cancel a citation issued under section 37 [*36*] of the HPA.

5. Accountability Mechanisms

Schedule B to the Terms of Reference, under the heading of Accountability Mechanisms, states that there should be a requirement for government approval of rules or bylaws. Such a provision is embodied in section 19(3) [*18(3)*] of the HPA. Further, section 19(5) [*18(5)*] provides that the Minister may request a board to amend or repeal an existing bylaw or make a new bylaw for the college if the Minister is satisfied that this is necessary or advisable. Section 19(6) [*18(6)*] of the HPA provides that where a board does not comply with a request under section 19(5) [*18(5)*], the Lieutenant Governor in Council may amend or repeal the existing bylaw for the College or make the new bylaw for the College.

1. The College notes that under the MPA, all rules must be approved by the Lieutenant Governor in Council. However, the College is adamantly opposed to the inclusion of sections such as 19(5) [*18(5)*] and 19(6) [*18(6)*] of the HPA. It submits that these sections are contrary to the principle of self-regulation as they are inconsistent with the notion that expert delegates should formulate rules on professional ethics and practice standards. It states:

> *In our respectful view, the Lieutenant Governor in Council should not be given the absolute right to impose a rule unilaterally. The concept of self-governance is that rules (and by extension, standards and ethics) are passed by peers and, accordingly, are entitled to some considerable degree of deference by the courts.*
>
> *It is our view that the strength and success of self-governance rests with the independence of the profession and to the extent it is weakened or eroded, so too is the credibility of self-governing bodies. There must of course be accountability and, in our view, this is provided for in the M.P.A. At present, section 4(2) of the M.P.A. provides that the Council of the College may make Rules with respect to any of the areas itemized in section 4(2)(a)-(k) of the M.P.A. Pursuant to s.4(5) of the M.P.A., a Rule has no effect until it is approved by the Lieutenant Governor in Council. To this extent, therefore, there is a review process in place.*
>
> *The existing M.P.A. provides adequate checks and balances in terms of its committee structure. There is one-third public representation on committees and Council. In addition, there are annual reports by the*

> *College to government and the requirement that the Lieutenant Governor in Council approve any changes to the Rules. The government retains control over amendments to the M.P.A. In addition, with respect to the College's procedures, the College is now subject to the jurisdiction of the Office of the Ombudsman.*
>
> *Given the above, it is our submission that the H.P.A. provision which gives the Lieutenant Governor in Council the power to amend the College Rules is neither required nor acceptable.*

The College also points out the danger of government imposing rules that will primarily be politically driven.

The Council proposes to address this issue by first discussing the principles upon which self-regulation is founded.

It is well established that self-regulation is a privilege not a right. Government grants a profession certain rights, such as the exclusive right to use a title or perform certain services, in return for which the profession agrees to regulate the profession in the public interest. As the Seaton Commission stated:

> *The purpose of regulating members of a profession is to protect the public from preventable harm. The privilege of self-regulation is granted to a profession by the provincial legislature. It is a social contract between the profession and the public. It is the property of the public the profession claims to serve.*
>
> *Self government is simply a delegation by the state of its regulatory authority in the professional sphere*. (emphasis added)

In the recent Supreme Court decision of Costco Wholesale Canada Ltd. v. The Board of Examiners in Optometry, dated March 20, 1998, Mr. Justice Lowry emphasized the public nature of a regulatory college's rules:

> *The rules are not merely private and non-governmental in nature, but have a direct and indirect public dimension in carrying out the government's regulatory scheme.*

In that decision, the Court struck down various rules under the Optometrists Act as being in violation of the Canadian Charter of Rights and Freedoms.

The nature of the relationship between self regulatory bodies and the state was also addressed in the Foulkes Report:

> *Thus it is clear that the principle of state primacy over professional decisions has been understood and established over a considerable period of time. In this manner it has been established that the state has not only a continuing and lively interest in the regulation of professions, but that the state has merely delegated to the professions the power of self-government as long as that power is exercised in a manner consistent with the public interest. The state has not abdicated its ultimate authority, but has established the primacy of public legislation over the private regulatory arrangements of the professions.*

The government maintains fundamental control over self-regulatory bodies through the legislative process through which it can make, amend or repeal a statute. The government can, at any time, change the regulatory structure. Further accountability mechanisms are frequently enacted through provisions requiring open meetings, public membership on boards and committees, the duty to submit an annual report, and review by the Ombudsman.

The ability to review and scrutinize regulatory instruments as set out in section 19(3) [*18(3)*] of the HPA is, in the Council's view, simply another means by which government supervises the grant of self-regulation.

The Foulkes Report discussed the general issue of accountability and stated:

> [M]*ost jurisdictions not only insist that professional law must be public law, as passed by the legislature and reflecting public policy, but also insist that any by-laws, rules or regulations under professional statutes be reviewed by public authorities and if necessary revoked and repealed by the state. For example, since 1948 the Province of Saskatchewan has written into law the provision that any by-laws, rules or regulations passed by the governing council of a profession must be submitted to the Department of the Provincial Secretary within thirty days of being made, and that these by-laws, rules and regulations may be reviewed by the Legislative Assembly. If these supplementary regulations under the Act are found by the legislature to be beyond the power of the professional body, or to be prejudicial to the public interest, they may be revoked and repealed.*

The Foulkes report commented on the lack of a mechanism for reviewing professional rules and regulations in British Columbia:

> [A]*lthough there can be no doubt that the legislature has the power to amend professional statutes, at present there is no effective agency able to perform a careful, continuous, and detailed review of such statutes and professional regulations.*

This led the Committee to recommend the creation of a tribunal to scrutinize regulations and revoke such regulations if necessary.

The Council recognizes the important distinction between approval of bylaws by the Lieutenant Governor in Council and by the Legislature or some other independent agency. Further, the bylaw making power set out in section 19(6) [*18(6)*] of the HPA is clearly a greater power than the power to review and scrutinize regulations.

However, the Council notes that although a provision like section 19(6) [*18(6)*] of the HPA does not appear in any of the individual profession-specific statutes , section 19 [*18*] currently applies to the several professions governed under the HPA, many of which have a long history of self-regulation.

A similar provision is contained in the Pharmacists, Pharmacy Operations and Drug Scheduling Act, RSBC 1996, c.363, section 63. The Lieutenant Governor in Council recently exercised its powers under this section on the issue of releasing prescription information for commercial purposes. The College of Pharmacists had proposed that prescription information must not be provided to a third party for any purpose other than patient care without the fully informed, written consent of the pharmacist, patient and prescriber. The Minister's main concern was that with the release of such information under any circumstances, drug companies would be able to target sales presentations to physicians. After negotiations with the College, the Minister recommended to the Lieutenant Governor in Council that release of information for commercial purposes be prohibited. As a result, the Lieutenant Governor in Council passed a new bylaw which effectively overrode the College of Pharmacists' position.

The Council notes that a similar provision has been in place in Ontario for over twenty five years.

Under the Ontario Health Disciplines Act (HDA) which was enacted in 1973, most of the health professions' regulation-making power was subject to Ministerial review and Cabinet approval. In addition, the HDA also gave the Minister the power to review and make, amend or revoke regulations. Section 3 stated:

> *3.--(1) It is the duty of the Minister to ensure that the activities of health disciplines are effectively regulated and co-ordinated in the public interest, to have appropriate standards of practice developed and ensure*

> *that these are maintained and to ensure that the rights of individuals to the services provided by health disciplines of their choice are maintained and to these ends to,*
>
> *(c) review proposals by a Council for changes in legislation or regulations of concern to that Council;*
>
> .....
>
> *(e) request a Council to make, amend or revoke regulations respecting any of the matters specified in its applicable Part...*
>
> .....
>
> *(2) Where the Minister requests in writing that a Council make, amend or revoke a regulation under clause (1) (e) and the Council has failed to do so within sixty days after the request, the Lieutenant Governor in Council may make the regulation, amendment or revocation specified in the request.*

The successor legislation to the HDA, the Regulated Health Professions Act, R.S.O. 1991, c.18 (RHPA) contains similar provisions. Section 95 of the RHPA contains an extensive list of a regulatory body's rule-making powers which are subject to Cabinet approval. Section 5(1)(c) of the RHPA provides that the Minister may, "*require a Council to make, amend or revoke a regulation under a health profession act or the Drug and Pharmacies Regulation Act*".

Section 5(3) and (4) provide:

> *(3) If the Minister requires a Council to make, amend, or revoke a regulation under clause (1)(c) and the Council does not do so within sixty days, the Lieutenant Governor in Council may make, amend or revoke the regulation.*
>
> *(4) Subsection (3) does not give the Lieutenant Governor in Council authority to do anything that the Council does not have authority to do so.*

Clearly, the types of power set out in section 19 [*18*] of the HPA are not unusual.

In its response the College cites the Ontario case of Szmuilowicz v. Ontario (Minister of Health) (1995), 24 O.R. (3d) 204, and submits that the case illustrates the difficulties which arise when regulations are enacted by government rather than by a self-regulating body.

In that case, the Ontario Minister of Health asked Cabinet to pass a regulation making it an act of professional misconduct for a physician to charge a block or annual fee for all uninsured services a physician may provide to a patient. The College had earlier refused to make such a regulation. The College challenged the regulation in court, and it was struck down.

The basis for the decision was that the government had exceeded its regulation-making power. The statutory provisions in question, though not identical to section 19(6) [*18(6)*] of the HPA, were very similar in that they granted the Lieutenant Governor in Council the power to make regulations which the College refused to make. The Court determined that the Lieutenant Governor in Council's power was not unfettered. Rather, the power must be exercised with due regard for the purpose and intent of the statute. In Szmuilowicz, the Court found that the government's purpose in enacting the regulation - to ensure accessibility and prevent abuses of "extra-billing" - was not consistent with the purposes of the MPA. A key factor in the Court's decision was the extensive evidence that the profession did not consider block billing to be professional misconduct.

The Court discussed the limits of ministerial rule-making power and stated:

> *When the Minister sees fit to override a determination made by a self-governing body of professionals authorized by the legislature to determine such issues, the views of the self-governing body of the profession should be taken into consideration by the court in determining whether the Minister pushed the definition of "professional misconduct" beyond permissible limits, given that the term is peculiarly defined by the standards of the profession . . ..*

The court found in this case that the Minister must be careful not to overstep the limits of his or her rule-making power, but the rule-making authority itself was not put in question.

The College submits that this case illustrates the difficulties that can arise when the government attempts to define what is ethical. Clearly, the Court in Szmuilowicz was not satisfied with the government's views on the issue of block billing, and the government was specifically rebuked for ignoring the views of the College. In the Council's view, the important principle to be extracted from this case is that the powers created by such a section are not unfettered but must be exercised having regard to the purpose of the statute and only after considering the regulatory body's position on the issue. In short, government cannot override a professional college's views on an issue without good reason. Thus, in the Council's view the case provides an important series of checks on the Cabinet's rule-making power and demonstrates the court's willingness to intervene when the Cabinet fails to accord appropriate deference to a professional college.

Thus, judicial review as applied in the Szmuilowicz case simply provides for another safeguard for the health professions, namely the courts' willingness to review the Minister's discretion in making rules for a health profession college. Clearly, the Minister's rule-making power is not unfettered.

In summary, section 19 [*18*] of the HPA is entirely consistent with the principles of self-regulation, the practice in other jurisdictions and indeed with the practice of other health professions in British Columbia. Section 19 [*18*] is not a challenge to professional self-regulation nor does it undermine the principle of self governance. Rather, it is simply another accountability mechanism which underscores the notion that self-regulation is a privilege, not a right.

The Minister has indicated that the Terms of Reference embody the *core principles* of professional regulation, and this provision must be considered one of them. Further, the other parts of section 19 [*18*] of the HPA embody the current bylaw approval process, and the Council expects that in most cases the existing process will be followed. Resort to the power set out in section 19(6) [*18(6)*] will likely only occur in the rarest of cases. The Council is only aware of the two instances referred to above, one in B.C. and one in Ontario, when the government has resorted to this power. Finally, the power granted the Minister is consistent with the object of attaining ease of statutory amendments, which is clearly in the public interest.

Having said this, in previous reports the Council has raised the issue of whether Lieutenant Governor in Council rule-making should have the power to make or amend any of the bylaws under the act. For example in the Council's "Nurses (Registered) Act Legislative Review Report (Preliminary)", it stated:

> *In considering the requirement for Cabinet approval set out in section 18(5) [19(5)] of the HPA, the Council concludes that not all rules should be subject to Cabinet approval. Many matters of professional governance are routine, and in the Council's opinion they should not be subjected to heightened scrutiny; for example, provisions related to financial administration and structure of various committees. The Seaton Commission stopped short of recommending that all rules be approved by government. A useful demarcation between which provisions do and*

do not require such scrutiny is provided in the Report of the Seaton Commission. In its chapter on professional regulation it stated:

> *(a)* [that] *the major public policy issues* [be] *addressed in the acts be approved by the Legislature. These would include:*
>
> *i. defining the exclusive scope of practice;*
> *ii. specifying the use of occupational titles;*
> *iii. establishing codes of ethics;*
> *iv. determining what constitutes unprofessional conduct and conflict of interest;*
> *v. permitting appeals to the Supreme Court; and*
> *vi. defining the duty of confidentiality;*
>
> *(b) the less substantive issues be addressed in regulations approved by the Cabinet. These would include:*
>
> *i. qualification of members to a college board of directors, election procedures and filling of vacancies;*
> *ii. classes and conditions of membership;*
> *iii. standards for membership, including educational requirements;*
> *iv. specialist requirements;*
> *v. reporting disciplinary decisions;*
> *vi. professional advertising;*
> *vii. college records;*
> *viii. a register of members;*
> *ix. inspecting a member's practice;*
> *x. membership reporting requirements;*
> *xi. exemptions from the regulations;*

xii. *the forms required under the Act;*
xiii. *details regarding any matter dealt with under the Act; and*
xiv. *responsibility for quality assurance and continuing education programs; and*

(c) *the administrative and internal procedural matters be addressed in college by-laws, be approved by the membership, be filed with the minister of health, and be made available to the public. The minister to have the authority to require that the by-laws be modified. These would include:*

i. *adopting a college seal;*
ii. *executing documents;*
iii. *approval of banking and finance;*
iv. *selecting committees and procedures for election to committees;*
v. *regulating meetings of the college and its committees;*
vi. *appointing officers and the delegation of college powers to those officers;*
vii. *prescribing forms for internal use;*
viii. *arranging for indemnity insurance;*
ix. *regulating membership fees; and*
x. *authorizing grants.*

Similarly, Ontario's RHPA provides a useful guide in sections 94 and 95 of the Procedural Code to matters which should be subjected to additional scrutiny. Therefore, in the Council's view, section 18 [19] of the HPA should be amended to limit the requirement for Cabinet approval to those matters which raise significant matters of public importance, and in this regard the Seaton Commission's statements and sections 94 and 95 of the Ontario RHPA are an appropriate guideline.

The Council also believes that it may be the case that the powers under section 19(5) and (6), [*18(5) and (6)*] of the HPA should not apply to all of a college's rule-making power.

The Council would welcome further submissions on this issue.

Further, the Council finds some merit in the College's argument on delay resulting from section 5(4) [*4.5*] of the MPA. This issue was also addressed in the Council's "Nurses (Registered) Act Legislative Review Report (Preliminary)" where the Council stated:

> *Another issue related to section 18 [19] of the HPA is delay. The RNABC states that it is currently experiencing significant delays in the rule approval process, and expects the problem to be greater were section 18 [19] of the HPA to apply. This is particularly so, notes the RNABC, given that section 18(6.1) [19(7)] requires distribution of all proposed regulations to all other health professions. The Council generally agrees with this point, and believes it would be contrary to the public interest if this provision were to result in delays in the rule making process.*
>
> *A possible suggestion regarding the issue of delay is to enact provisions establishing an independent body with the mandate to review rules and bylaws. The review would be independent of both government and the professions, and strict time lines could be imposed. Further, a provision could be enacted stating that rules proposed by regulatory bodies automatically take effect within 90 days of submission, unless the government indicates, in writing, specific objections to the rules.*

The Council would appreciate any further comments regarding this issue.

2. Section 77 [*68*] of the MPA provides for publishing a list of members. The College is willing to consider an amendment to this section. In the Council's view, an amendment to section 77 [*68*] of the MPA must clearly refer **only** to the member's business address, as opposed to the member's personal address. However, if the member's business is located at his or her personal residence, that address must be included.

3. The Council requested further information about section 24 [*23*] of the HPA which provides that no action for damages lies for anything done in good faith by a member or officer of the College. In contrast, section 70(1) [*61(1.2)*] of the MPA extends such protection to "members". The Council asked whether the MPA section is intended to protect members only with respect to performance of college duties as distinct from the practise of medicine. The College agrees that the section is only

intended to prevent actions against members for duties performed on behalf of the College or legislative duties performed by members pursuant to the MPA. Thus, the Council believes that this section should be amended to more properly reflect its intention.

6. The Health Professions Act Bylaws

The Terms of Reference direct the Council to conduct a comparative analysis of the HPA with each professional statute, along with any relevant rules, regulations or bylaws, in order to ensure that they contain the *core principles* of professional regulation. The Terms of Reference also indicate that the HPA embodies those *core principles* of professional regulation which the Minister considers are desirable or essential for regulating the profession in the public interest.

In the initial phase of the review process, the Council also considered the HPA draft Bylaws. These Bylaws are distributed to newly designated professions as a guide for drafting bylaws for their new regulatory colleges. Several questions in the Council's comparative analysis referred to the draft Bylaws. The Council informed the professions that although the Bylaws were not legally binding, they reflected the Ministry's view of provisions which were desirable for regulating a profession in the public interest.

During the review process, the original draft Bylaws were substantially rewritten, and many provisions were removed and some added. This complicated the Council's process as its initial questions referred to the original draft of the Bylaws. The revisions also underscored the fact that the Bylaws were not legally binding, and subject to modification, making it somewhat difficult to assess which bylaw provisions embody *core principles* of professional regulation.

Nonetheless, many provisions appear in both versions of the draft Bylaws, and are also consistent with the *core principles* discussed in the Terms of Reference. The Council felt it important to note where provisions in the MPA and its Rules could be considered inadequate, incomplete or missing having regard to the draft Bylaws. The Council has decided to include its account of such provisions in this separate section in order to reflect the fact that the Bylaws have a different legal status than the HPA.

In its review of the MPA, the Council notes the following:

1. Bylaw 44 now bylaw 63 of the HPA sets out procedures for mediation. The College is prepared to amend the MPA to include provisions for alternate dispute resolution (ADR). However, it notes that it would prefer a more detailed provision than bylaw 44 now bylaw 63 of the HPA.

While the College indicated that it would review the matter of ADR in the fall of 1996 and would then inform the Council on the developments, to this date the Council has not received any further comments from the College. In the Council's view, mediation is a powerful process to expeditiously resolve complaints. The Council accepts the College's position that this provision should be broader in scope. However, the Council believes that the requirement for consent of the complainant and the registrar before mediation be undertaken, is an important part of the mediation process and should be included in such a provision.

2. Bylaws 11(3)(a) to (d) now bylaws 12(5)(a) to (d) of the HPA provide a guide to the circumstances in which the public may be excluded from a committee meeting:

> *(5) The board may exclude any person from any part of a meeting if it is satisfied that*
>
> *(a) financial or personal or other matters may be disclosed of such a nature that the desirability of avoiding public disclosure of them in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that meetings be open to the public,*
>
> *(b) a person involved in a criminal proceeding or civil suit or proceeding may be prejudiced,*
>
> *(c) personal matters or property acquisitions will be discussed, or*
>
> *(d) instructions will be given to or opinions received from legal counsel for the college, the board or committees.*

No such provision is contained in the MPA or Rules because meetings are currently held *in camera*. The Council recommended above, at pages 20 and 21, that such hearings generally be open to the public, and therefore this bylaw should also be included in the MPA or its Rules as it sets out the circumstances in which such meetings can be closed.

3. Bylaw 46 now bylaws 65 and 66 of the HPA provides that the board must keep records of the results of all investigations of the inquiry committee and all decisions of the discipline committee, and it must publish a notice where disciplinary proceedings result in limitations or suspension of a registrant's practice. Bylaw 49(1)(c), (d) and (e) now bylaw 44(1)(d) of the HPA provide that the registrar must provide, upon inquiry, details of restrictions or suspensions of a registrant's practice. The College maintains

that it currently complies with the requirements of bylaw 46 now bylaw 65 and 66 of the HPA. However, it points out that its media releases do not set out the facts of the case or the specific reasons for the decision due to the *in camera* nature of its proceedings.

This public disclosure issue is closely tied to the general issue of *in camera* hearings by the College. The College indicates its willingness to change its media release format if changes to rule 15 of the MPA were made. This rule provides that all hearings shall be held *in camera* unless the Executive Committee or the College council otherwise directs and the Council has recommended that this rule be changed to provide for public hearings. Therefore, the Council recommends that the College's disclosure practices be amended to more closely accord with bylaw 46, now bylaws 65 and 66, of the HPA.

4. The College has no objection to amending its Rules to include a provision similar to bylaw 46(5) now bylaw 64(5) of the HPA. This provision directs the discipline committee to consider previous relevant actions regarding the member whose penalty is pending determination. The College refers to Part XVIII of its Rules regarding the requirements for members suspended from practice. However, the MPA Rules do not contain a requirement similar to bylaw 46(5) now bylaw 64(5) of the HPA which provides that:

> *In determining the penalty to be imposed on a registrant under section 38(1) of the Act after making a determination on the facts, the discipline committee must consider a previous relevant disciplinary decision regarding the registrant or an undertaking or consent to a reprimand given by the registrant under section 35(1) of the Act.*

In the Council's view, this HPA bylaw should be included in the College's Rules.

5. HPA draft bylaws 11 and 12, now bylaws 12(4) and 23(3) of the HPA provide that meetings must be open to the public, and they apply not only to disciplinary meetings but also to meetings of the board of the college as well as all committee meetings. The College submits that keeping the committee meetings open to the registrants and the public would unduly disrupt and delay the proceedings of the various committees which deal in large part with extremely sensitive and confidential information.

The Council has already recommended above, at pages 20 to 21, that the MPA should provide for open disciplinary hearings. However, the Council tends to agree with some of the College's remarks on this provision. In the Council's view, while it is important that meetings of committees such as the College council, the Executive Committee and the inquiry committee (the discipline committee under the HPA) which conduct significant public functions should generally be open to the public, the work of other committees such as the registration and investigative committee (the inquiry committee under the HPA) should not be open to the public as the work of such committees may be impaired by such a requirement. In the Council's view, such committees are more investigative in nature and require confidentiality and candour to ensure their proper functioning, and the matters do not directly impact on the public interest.

6. HPA bylaw 42 now bylaw 97 provides for mandatory liability insurance. The College is concerned that it may lack the appropriate mandate to require such insurance. The Council notes that the physicians' voluntary liability coverage through the Canadian Medical Protective Association is not mandatory and is not considered "insurance" under the Insurance Act, RSBC 1996, c.226, and therefore, the MPA should specifically provide for mandatory liability insurance.

7. General Conclusions from Comparative Analysis

After a careful review of the HPA and the MPA, the Council is of the view that the legislation regarding the medical profession is for the most part consistent with the *core principles* of professional regulation. However, on some important issues, notably those related to the complaint and disciplinary process and the mandate of the regulatory body, the Council found several provisions to be inadequate, incomplete or missing having regard to the *core principles* embodied in the HPA and discussed in the Terms of Reference.

B. IMPROVEMENTS TO THE HEALTH PROFESSIONS ACT

In the course of its review of the MPA, the Council has determined that there are several matters which ought to be included in a professional statute. For the most part, these represent either deficiencies in the HPA or provisions in the MPA which represent an improvement on the HPA. These include the following:

1. Section 63 [*55*] of the MPA creates a duty upon registrants to report other registrants. It provides:

> *(1) A registered member must report to the registrar the condition of any person registered under this Act whom the member, on reasonable grounds, believes to be suffering from a physical or mental ailment, emotional disturbance or addiction to alcohol or drugs that, in the member's opinion, if the person continues to*

> *practise medicine or surgery, might constitute a danger to the public or be contrary to the public interest*

An earlier version of the HPA Bylaws contained a similar provision but it does not appear in the current version of the HPA Bylaws. In the Council's view this provision is in the public interest and ought to be included in the professional statute. However, as noted above at pages 24 to 25, the Council believes that the process for further pursuing such matters must include appropriate procedural safeguards for the member.

2. Section 51 [*48*] of the MPA, and Part XII of the MPA Rules set out provisions for investigating the skill and knowledge of a registrant and for peer assessment of medical office practice. The Council supports the need for such processes, and believes they are an integral part of a quality assurance program. However, the Council is concerned that the current process under the MPA, and in particular section 51 [*48*] of the MPA, provide remedial jurisdiction to the College which is essentially disciplinary in nature, without also affording sufficient procedural protections to the member under investigation. The Council discussed this issue above, at pages 23 to 24. Essentially, the Council believes that should the College wish to proceed with disciplinary matters upon completion of such process, there should be strict rules regarding the use of information gathered during such a process as well general procedural safeguards for the member.

3. Under the MPA, the registrar has the power to resolve "minor" complaints. In contrast, the HPA provides that all complaints shall be investigated by the inquiry committee. The Council noted in its preliminary legislative review report on the Dentists Act that in its view the HPA did intend that some matters could be resolved by the registrar. In that report, the Council stated:

> ...[T]*he HPA does not intend that the inquiry committee must conduct an investigation in all cases. Although s. 32(4)(a) [33(6)(a)] of the HPA states that all complaints must be investigated, it is prefaced by the words "[w]here a complaint is delivered" found in s.32(1) [33(1)], thus indicating that in some cases complaints will not be referred.*
>
> *Further, the Council notes that the Registrar may also be designated as an inspector, pursuant to section 26(2) [27(2)] of the HPA, and the Registrar is mandated to deliver to the inquiry committee a copy of the complaint, an assessment thereof and any recommendations for the disposition of the complaint, according to section 31(2) [32(2)] of the HPA.*

> *In the Council's view, the* *HPA* *clearly intended that the Registrar would be able to deal with minor complaints summarily, and the inquiry committee would only need to conduct an investigation in cases where the Registrar refers the matter to that committee. The Council agrees that a registrar or other designate can play an invaluable role in the initial handling of complaints.*
>
> ...
>
> *However, the Council believes that any summary review process conducted by the registrar must provide that decisions to dismiss complaints are subject to an internal right of appeal to the inquiry committee of the College.*

In short, the Council supports an enhanced role for the registrar in dealing with complaints in the first instance, and believes that the HPA should be amended to clarify this intention.

However, the Council does not believe the term "minor" complaint to be an appropriate standard for the exercise of such powers. Rather, the Council believes that s. 33(6)(a) [*32(4)(a)*] is a more appropriate standard by which the registrar may exercise its summary disposition power. That section provides:

> *(6) After considering any information provided by the registrant, the inquiry committee may*
>
> *(a) take no further action if the inquiry committee is of the view that the matter is trivial, frivolous, vexatious or made in bad faith or that the conduct or competence to which the matter relates is satisfactory,...*

Further, the Council believes that any such decisions must be subject to a right to an internal appeal.

4. In its response to the Council's question about section 34(1) [*33(1)*] of the HPA which provides that the inquiry committee must report to the board in all cases where it decides not to issue a citation, the College states that such a requirement is too onerous to apply in practice. In its preliminary legislative review report on the Dentists Act, the Council stated its agreement with this position in the following terms:

> *The Council agrees that this reporting requirement is too onerous, particularly for larger colleges which receive several hundred complaints*

> *a year. Thus, the Council recommends that this requirement be removed from the HPA. However, the Council believes that decisions to dismiss a complaint should be subject to an appeal. Although the College notes that section 54 [55] of the DA provides for an appeal, that appeal is to the Supreme Court. In the Council's view, parties should be provided with an internal right of appeal to the College council (or board) in respect of complaints dismissed by the inquiry committee.*

Thus, in the Council's view as long as the statute contains a right to an internal appeal, there should be no need for reporting to the board.

5. The Council asked the College about bylaw 1 of the HPA which defines "sexual misconduct" and bylaw 48 which defines "professional misconduct". Both terms are no longer defined under the HPA nor under the current draft bylaws; however, the HPA refers (for, example in section 33(4)(c) [*32(2)(c)*]) to "professional misconduct". The College makes a persuasive argument that both terms should remain flexible.

The Council has previously acknowledged in its "Dentists Act Legislative Review Report (Preliminary)" the difficulty with defining the terms "professional misconduct" and "conduct unbecoming". The Council stated:

> *The Council accepts that in some cases conduct occurring outside the practice of one's profession may be cause for disciplinary proceedings by a professional college. In such cases, however, the conduct must be relevant to a member's suitability to practice the profession. Therefore, the Council believes that the HPA should be clarified to ensure that it encompasses both "professional misconduct" and "conduct unbecoming".*

Therefore, the Council agrees that the terms "sexual misconduct" and "professional misconduct" should remain flexible in order to give the health profession colleges sufficient discretion to define the two terms.

6. The College objects to the requirement in section 37(1)(b) [*36(1)(b)*] of the HPA that particulars of evidence must be included in the notice of citation for a disciplinary hearing. It states:

> *Evidence continues to be gathered following the issuance of charges and we perceive procedural difficulties with continued amendments to the charges issued. In our view, it is appropriate for a disciplinary charge to allege the elements of the offence but not all of the evidence to be led in support of the charge. Counsel for the College are directed to give*

> *disclosure of "particulars", including witness statements, documents, etc. either concurrently with the charge or within a short period after its issuance. There is no question that the accused member is entitled to the process but rather to the legislative requirement that particulars of any evidence form part of the charge or citation.*

The Council agrees that the requirement in section 37 [*36*] of the HPA regarding particulars of evidence may impair the disciplinary process. However, the Council believes that it is important that the citation include a copy of the charging document.

Further, this matter raises the important issue of disclosure which is not dealt with in the HPA or the MPA. It is important that members be apprised of the evidence in support of disciplinary charges prior to the hearing. Such a provision is embodied in section 42 of Ontario's Health Professions Procedural Code which provides:

> *(1) Evidence against a member is not admissible at a hearing of allegations against the member unless the member is given, at least ten days before the hearing,*
>
> > *(a) in the case of written or documentary evidence, an opportunity to examine the evidence;*
> >
> > *(b) in the case of evidence of an expert, the identity of the expert and a copy of the expert's written report or, if there is no written report, a written summary of the evidence; or*
> >
> > *(c) in the case of evidence of a witness, the identity of the witness.*

This provision provides a good model for a similar process which should be included in the professional statute.

7. The College indicates its interest in amending section 71 [*62*] of the MPA to clarify the current position that the member, as a party, has a right of appeal from a decision of the inquiry committee but the complainant, as a witness and not a party, does not have a right of appeal.

The Council has previously dealt with this issue in its preliminary legislative review report on the Dentists Act. The Council agreed with the objection by the College of Dental Surgeons of B.C. to giving the complainant status as a party in a disciplinary hearing:

> *The Council generally agrees with these submissions. Obviously, the complainant is a crucial part of the discipline process but in the Council's view, the regulatory body is responsible for prosecuting the complaint on behalf of the public and a complainant should not be made a "party" to the proceeding. The Council agrees that granting a complainant party status can have detrimental effects on the process. Nonetheless, the Council believes that the HPA and the core principles indicate the importance of involving the complainant in the process. In particular the core principles state that appropriate rights of appeal should be available to both members and complainants. In the Council's view, the complainant should be given the right to appear at the disciplinary hearing and a right of appeal, but the HPA should be amended to remove the right of the complainant to appear as a "party".*

8. Section 71(4) [*62(4)*] of the MPA provides that the Executive Committee may stay the operation of any penalty or punishment imposed pending the outcome of an appeal. No such provision is provided for in the HPA. The College states:

> *The discretion is exercised sparingly and never where there is any threat of danger to the public. There are, however, circumstances where, for example, a suspension has been imposed and, if a stay was not granted, the issues on appeal would be moot. The discretion to grant a stay can be used to extract agreements and undertakings from a member and to elicit commitments on early appeal dates and interim restrictions on practice which, in our view, may not otherwise be able to be imposed. The discretion is always exercised with the public interest as the primary criterion and avoids the requirement in some cases of lengthy applications to the courts.*

The Council accepts that such a provision is in the public interest, particularly as it avoids the need for lengthy court proceedings. However, the Council believes that such a provision must include a statement that the discretionary power to stay the imposition of a penalty or punishment not be exercised where there is any potential for harm to the public by reason of the stay.

9. The Council asked for the College's position on section 51(3) [*50(3)*] of the HPA which prohibits prosecution of offences after two years. The College states:

> *We do have some concerns about whether such a limitation is in the public interest. For example, if a person practises medicine without a licence and 3 years later the College learns through a patient or the family of a deceased patient of an adverse consequence of such a practice, is*

it in the public interest for the Ministry of the Attorney General to be unable to prosecute due to a limitation period?

The College has made a valid point about this section, a general two-year limitation may be appropriate in certain circumstances, in cases involving practising as a health professional without a licence, it may not be. This issue is necessarily tied into the entire issue of regulating scopes of practice. As noted previously the purpose of the Council's ongoing scope of practice review is to move from an exclusive scope of practice model to a reserved acts model. Under either system, however, it will be necessary to create offences for performing services, be it "practising medicine" or "performing reserved acts", without a licence. The Council intends to further consider this issue, and would welcome additional submissions.

10. The College indicates its support for section 36 [*35*] of the HPA which provides for resolving matters through the use of registrant's undertakings or upon consent. However, the College indicates that the undertaking should be expanded to include such matters as "*the requirement to consent to a psychiatric assessment or other medical examinations, to take counselling with a psychologist or psychiatrist, to attend educational or remedial programs, etc.*" The Council agrees with the College's position on this issue, and believes this section should be amended to include a wider scope of undertakings and consents.

11. Section 20(1) [*19(1)*] of the HPA provides that the registration committee is responsible for granting registration to applicants. The College states that in the medical profession registration is generally an administrative task which can be handled by the registrar. If the criteria established by Council are met then the Registrar staff has authority to initiate the registration which is ultimately approved by Council. Where the criteria are not met, the Registrar staff may refer the application to the Registration Committee for review.

The Council agrees that for larger professions in which the requirements for registration are clear, a committee need not consider every application. The criteria for registration in the MPA are well known and transparent, making the Registrar's decision essentially administrative. Therefore, the Council recommends that section 20(1) [*19(1)*] of the HPA be modified to provide for a more flexible registration process, including a registrar's review in appropriate circumstances.

12. In the matter of reinstatement of a member, the College grants its council under section 62 [*54*] and rule 176 of the MPA the discretion to review the criteria for reinstatement. A previous version of the HPA Bylaws contained a similar provision but it does not appear in the latest version of the HPA Bylaws. Again, the Council perceives this as a positive rule and recommends its incorporation into the HPA.

13. On the issue of Cabinet approval as set out in section 19(5) [*18(5)*] of the HPA, the Council has extensively discussed above, at pages 26 to 36, the College's response and recent jurisprudence dealing with this point. The Council reiterates that it welcomes further submissions on which matters should or should not be subject to Cabinet approval, the issue of whether the power to make bylaws should apply to all subordinate legislation, and the issue of mechanisms for dealing with delay.

14. Section 50(1) and (3) [*47(1) and* (3)] of the MPA provide that:

> (1) *A person who has been convicted of an indictable offence by a court in British Columbia or elsewhere is not entitled to be registered and the council may erase the person's name from the register.*
>
> ...
>
> *(3) The registration of a person must not be refused and the name of a person not be erased for a conviction for a political offence or for an offence that ought not, in the council's opinion, either from the nature of the offence or from the circumstances under which it was committed, to disqualify the person from practising under the Act.*

The College recommends that this section enable a college to take action with respect to both members and applicants who have been the subject of disciplinary action by other medical colleges.

The Council addressed a similar issue in its "Dentists Act Legislative Review Report (Preliminary)" where section 26(5)(b) of the Dentists Act, RSBC 1996, c.94 was discussed. The section states:

> [I]*f, after giving the applicant an opportunity to be heard, the council determines that*
>
> ...
>
> *(b) at the time of the application an investigation, review or proceeding is taking place in this or any other jurisdiction which could result in the suspension or cancellation of the applicant's authorization to practise dentistry in that jurisdiction,*

...

> *the council may refuse to grant registration or grant registration for a period or subject to other terms and conditions.*

The Council agreed in that report that "*this provision is an effective public safety measure*". Similarly, the Council believes that section 50 [*47*] of the MPA is another valuable measure to deal with members and/or applicants who have previous records of convictions, and pursuant to the proposed amendment, disciplinary actions taken against them in other jurisdictions.

The Council finds that these provisions are an important safeguard for the public and recommends that the HPA be amended to include this section. Further, the Council believes it important that such provisions apply only to offences that are relevant to a member's suitability to practice.

15. The Council notes that the MPA provides for the appointment of a special deputy registrar under section 21 [*19.1*] who is primarily responsible under section 65 [*56.1*] for receiving and investigating written complaints by members constituting sexual misconduct committed by another member. In the Council's view, the appointment of a special deputy registrar whose responsibility is to recommend actions to be taken by the Sexual Misconduct Review Committee respecting complaints on sexual misconduct is another important complaint and disciplinary process that serves the public interest.

16. Section 67(2) [*58(2)*] of the MPA empowers the College council, the Executive Committee or inquiry committee to employ, at the College's expense, the legal or other assistance they think necessary or proper for the conduct of an inquiry or hearing. The Council believes that this provision is an important discretionary power which enhances the quality of the hearing process and recommends its inclusion in the HPA.

17. Part X of the MPA Rules deals with restrictions to return to practice and the competency examinations required of a person wishing to return to practise. Former HPA bylaw 39(2) of the HPA also set out certain requirements for return to practice. However, that provision no longer exists in the current HPA Bylaws. The Council believes that competency requirements upon return to practice are in the public interest and should be included in a professional statute. Part X of the MPA Rules provides a good model in this regard.

C. IS THERE A NEED FOR A SEPARATE ACT?

The Council proposes to address this issue by discussing the general policy favouring designation and the profession-specific arguments regarding designation.

1. The General Policy Favouring Designation

As stated in the introduction to this report, the Terms of Reference reflect a general policy that designation is the favoured option, and that a profession must **justify** a continuing need for a separate statute. The Council would like to expand on this important issue.

Under the existing regulatory system, each profession is governed by its own professional statute. The terminology used as well as the regulatory structures and processes created vary widely from profession to profession, especially with respect to the complaints and discipline process. This variation and resulting complexity is confusing to the public and registrants. In the Council's view, a uniform regulatory system under the HPA would eliminate much of the complexity and confusion, and foster the development of a common jurisprudence for the health professions.

The administrative problems created by the existence of several profession-specific statutes was underscored when the government introduced the Health Professions Statutes Amendment Act, SBC 1993, c.50. The Act introduced changes to several different statutes governing individual professions. The changes included enhanced inspection powers, interim suspension powers and set out the duties and objects clause for regulatory bodies. Because of the requirement to amend each individual statute, the Act was enormous, consisting of 66 sections and some 69 pages. Were the professions to be governed under umbrella legislation, the government could act quickly to amend one statute to provide for provisions which it deems to be in the public interest and which would apply to all professions included in that statute.

The complexity of the current legislative structure was also demonstrated by mistakes made during the recent revisions of the statutes of B.C. For example, when the Optometrists Act was revised, the provision for government approval of the optometry rules was inadvertently omitted. In the result, the Board of Examiners in Optometry immediately amended its rules and notified the profession that these rules were binding without ever having been approved by Cabinet. This has necessitated further legislative involvement.

Several recent reports of Royal Commissions and government policy statements has emphasized that an integrated approach to the delivery of health care is in the public interest. Coordination and cooperation amongst health care providers is of fundamental importance to such an approach, and a uniform regulatory structure enhances the government's ability to apply health care policy consistently.

One policy initiative for which coordination and consistency is particularly relevant is the scope of practice review process the Council is currently conducting. The Ministry has requested that the Council review the scopes of practice of the existing professions with a view to implementing a new regulatory framework for health professions in British Columbia. The key elements of the new framework are broad, non-exclusive scope of practice statements and narrowly defined reserved acts. Reserved acts are those elements of a profession's scope of practice which present such a significant risk of harm that they should be reserved to a particular profession that is qualified to perform them. The new system will create shared scopes of practice, and it is likely that many of the reserved acts will be shared amongst several professions. A uniform regulatory structure would ease the implementation of the new model of professional regulation.

A general policy favouring a uniform regulatory structure was referred to in the report of the Seaton Commission on Health Care in BC. The following excerpts are from that part of the Seaton Commission's report which deals with regulation of the health professions:

> *There is a lack of consistency among the 16 provincial acts that govern the health care professions, despite the fact that all of the colleges established under the acts have the same legislative mandate: to protect the public from preventable harm. Such inconsistency increases the likelihood of variations in judicial interpretations of the acts. Underlying this situation are persistent jurisdictional disputes and a distinct lack of cooperation among the health care professions.*
>
> ...
>
> *In general, a lack of consistency characterizes the acts with respect to complaints, discipline and appeals, resulting in insufficient public accountability, no uniformity in the structure or organization of the different statutes, and an absence of common terms.*
>
> ...
>
> *The Health Professions Act has the potential to influence significantly the future of self regulation of health care professions. Under this new Act, the Health Professions Council can make recommendations to the minister concerning which groups should be granted self-regulation status, their titles, and the extent of their scopes of practice, if any. The Act could be used to create uniform legislative procedures.*

These views led the Seaton Commission to conclude that the existing health professions acts be repealed and the HPA be revised to serve as the umbrella act for regulating health professions.

The general policy of legislative uniformity is also consistent with initiatives in several other provinces, notably Ontario which has implemented umbrella legislation for the health professions and Alberta which is in the process of enacting umbrella legislation.

The Council agrees with these statements about the desirability of uniformity in legislation and accepts that, as a general rule, designation under the HPA is the preferred option. This general policy favouring designation is embodied in the Terms of Reference which refer to the desirability of a "*high degree of consistency between statutes*" and of "*minimiz[ing] the number of statutes that apply to the governance of health professions*". Indeed, the Terms of Reference and attached Criteria and Guidelines make it clear that the Council is to consider whether there are unique features of the profession or other relevant factors that justify a need for a separate statute.

However, the Council emphasizes that although the policy preference is for uniform legislative structures, the HPA model still embodies a strong commitment to self-regulation through the "college" system of regulation.

With this in mind, the Council proposes to now review the arguments presented by the College which it believes justify the continuing need for a separate statute.

2. The Profession Specific Arguments Regarding Designation

The College provided a separate submission dealing solely with the issue of whether the medical profession should be designated under the HPA. The submission is divided essentially into three parts: Introduction and general comments, advantages and benefits of the MPA and Rules, and consistency with and objections to the HPA.

In each section, the College outlines various arguments which in its view justify the retention of a separate statute. The Council proposes to deal with each section of the College's response in turn.

a) Introduction and General Comments

At the outset, the Council would like to correct a misapprehension which the College appears to have about the effect of designation of the profession under the HPA. In its 1997 Annual Report, the President of the College had this to say about the general issue of designation:

> ***Self-governance by the College is seriously threatened by the proposed Health Professions Act. The Health Professions Act is a proposed legislative act that would replace the Medical Practitioners Act. New legislation would establish an Act that would regulate and make rules for the medical profession that in effect would destroy the concept of self-governance. Over a century of experience and evolution of rules and regulations, over a century of judgments and discretion based on precedent, would be replaced by imposed regulation and rigidity.***
>
> ***Where in government today is the expertise to effectively administer the complexities of medical standards? Where is the experience? Where are the personnel? What specific political aims are to be achieved by altering medical standards that have been deemed appropriate by its own practitioners?***
>
> ***The proposed Health Professions Act is an umbrella act designed to serve all the health profession colleges. Many are new colleges with no regulatory experience and tiny memberships. How a generic act such as the Health Professions Act can meet the needs of both a college of 20 members and a single defined role and a complex college of 8,000 active members defies explanation. Government's drive to determine medical standards, in principle, without a clear concept of the intricacies of what we do, and without a clear idea of what is deficient, is unacceptable. The concept of politically controlled standards of the medical profession is anathema to the scientific free spirit and a dangerous intrusion into ethics and treatment.***
>
> ***The solution rests with us. We must continue to do a better job than government could possibly do. We must be more open so that our work in the College is demonstrably seen to be better. We must be more flexible than we have hitherto been.***

The College's concerns are misplaced. The HPA still provides for self-regulation, albeit with different processes and structures, and a college designated under the HPA still has the same fundamental purpose of governing the profession in the public interest. All professions designated under the HPA would continue to be governed, in part, by regulations and bylaws made by the college and which contain provisions to deal with profession-specific matters.

The Council emphasizes that the entity which has the greatest impact on the activities and conduct of the members in the day to day practice of their profession is clearly the College itself with its rules, regulations and bylaws. Regardless whether the relevant statute is the MPA or the HPA, from the members' perspective, it is the College which has the primary role.

The College equates designation under the HPA with the repeal not only of the MPA, but of the entire administrative and regulatory structure of the medical profession. But this is not the case. While the legislature has decided that uniform legislation for all health professions is in the public interest and has enacted the HPA to implement this objective, uniform legislation and eventual designation under the HPA does not take away from the health profession colleges their fundamental function of regulation of their members. The HPA simply provides for the administrative structure on which the individual health profession colleges will base their particular requirements. For example, the health profession colleges will still have extensive bylaw making powers including the power, set out in section 19(1)(t) [*18(1)(r)*] of the HPA, to establish any "*other committees the board determines are necessary or advisable*".

The College also makes several submissions regarding designation under the HPA. First, the College submits that the onus is on government to justify legislative changes:

> *The process should be a bilateral one in which a profession is not only called upon to demonstrate the benefits of its legislation, but government either directly or through the vehicle of the HPC, is able to articulate why, with respect to the medical profession in particular, the HPA and Bylaws better serve the public interest. In so doing, judicial precedents should be studied because the courts are the final arbiters when it comes to comment on a body's procedures, its decisions and processes. A review of the decisions amply demonstrates that, at least insofar as the judiciary is concerned, the public is well-served by the MPA.*

In the section of its report entitled "The General Policy Favouring Designation", the Council discussed the fact that its review is based on the premise that it is the profession that must justify the need for a separate act. Further, the main impetus for the Council's legislative review process was the report of the Seaton Commission, which made a specific recommendation that the existing statutes be repealed and the HPA be revised to serve as the umbrella act for regulating health professions. The Seaton Commission's rationale for its conclusions is set out in "The General Policy Favouring Designation" section of this report.

Second, the College submits that the breadth and complexity of the practice of medicine require an individualized statute:

> *The fundamental premise of our position is that the scope of practice of medicine, the breadth and complexity of activities encompassed by that scope, the size of the membership, and the history of self-governance of the medical profession, require legislation specifically crafted to suit these circumstances. While the H.P.A. serves as a good standard statutory model which provides a legislative framework to meet the requirements of new and emerging professions with limited scopes of practice and a small membership, it is not, in our view, well equipped to meet the needs of the College.*

The College further notes that:

> *The College has highly developed systems and structures for all functions ranging from registration to competency, monitoring and discipline. It has evolved pro-active programs such as the Credentials Advisory Panel, Diagnostic Accreditation Program, Methadone Program, Non-Hospital Medical/Surgical Facilities Program, Office Medical Practice Assessment Program, Practice Guidelines Committee, Prescription Review Program and the Triplicate Prescription Program, and programs for intervention, treatment and monitoring of substance abuse and other incapacities.*

The Council again emphasizes that the HPA represents a strong commitment to the principle of self-regulation, and that it will continue to be the case that the College, through the development of rules and bylaws, is the body primarily responsible for regulating the profession and setting out the parameters for medical practice. The Council notes that under the HPA structure a regulatory college still has broad powers to deal with profession-specific issues, through both the regulations and bylaws under the HPA. The Council notes that all of the programs referred to in the above excerpts are, in fact, set out in the Rules to the MPA, not the MPA itself. Further, the governance structure under the HPA is very similar to that under the MPA, and the College itself has conceded that there are many areas of consistency between the two statutes.

Further, the Council does not accept the College's assessment that the HPA was designed for smaller and emerging groups seeking to upgrade their status from an unregulated occupation to a regulated health profession. While the initial focus of the HPA may have been new and emerging professions, nothing in the HPA restricts its application to new professions. In any event, the Terms of Reference clearly indicate that the government is contemplating uniform legislation for the health professions, and has directed the Council to use the HPA as its template for assessing the quality of the existing professional statutes. The basic structures in the HPA are very similar to those in the current MPA, and the Seaton Commission recommended that a revised HPA serve as the umbrella statute for regulating all health professions.

In summary, the Council does not believe that the breadth and complexity of the practice of medicine justifies the retention of a separate statute.

The College also submits that the MPA has a "*proven track record*" and "*considerable judicial comment of weighty precedential value*", and that such precedents would be lost were the College to be designated under the HPA. The College states that such decisions demonstrate that, in the judiciary's eyes, the public is well served by the current MPA. The Council notes that the College has not provided an account of such decisions nor an explanation of why their precedential values would be lost. In any event, many of these precedents, and in particular those which define "professional misconduct", will continue to be useful as that term is no longer expressly defined under the HPA or its current bylaws. Finally, the Council notes that decisions by the courts in respect of interpretation of the statute, and in particular interpretation of procedural provisions, rarely assess the merits or otherwise of the provisions. Rather, such decisions take the provisions as granted and simply determine whether they have been applied properly. In short, the Council does not believe the body of precedent under the MPA justifies the retention of a separate statute nor that such precedents would be rendered valueless.

b) Advantages and Benefits of the Medical Practitioners Act and Rules

In this section, the College outlines various sections in the MPA which it believes represent improvements on the HPA. The College also repeats its arguments regarding section 19(5) and (6) [*18(5) and (6)*] of the HPA which relate to the College's rule-making power. Finally, the College again makes a submission about judicial precedents under the MPA.

The Council has dealt with virtually all of these points in other sections of this report and has indicated its disagreement with the College on several of them. The Council has already set out, in its *core principle* analysis, its position regarding section 51 [*48*] of the MPA which provides for investigation of members' skill and knowledge, section 64 [*56*] of the MPA on the duty to report on members who are under hospital treatment, sections 81 to 84 [*72 to 75*] of the MPA on the definition of practice of medicine, section 99(2) [*93(2)*] of the MPA relating to approval of medical education programs, and section 19(5) and (6) [*18(5) and (6)*] of the HPA on the rule-making power of the Lieutenant Governor in Council.

With respect to the remainder of the matters raised, the Council has indicated that it agrees with the College's position that several of the provisions of the MPA are in the public interest and should be included in the professional statute. These matters include section 63 [*55*] which imposes a duty upon registrants to report other registrants, section 71(4) [*62(4)*] which provides that the Executive Committee may stay the operation of any penalty or punishment imposed pending the outcome of an appeal, and section 62 [*54*] and rule 176 of the MPA which grants the College council the discretion to review the criteria for reinstatement.

Finally, the Council has also discussed the issue of judicial precedent in the immediately preceding section of this report, at page 55.

c) Consistency with and Objections to the Health Professions Act

In the first part of this section, the College outlines several areas of consistency between the MPA and the HPA. The College notes that all of these matters were previously canvassed in its response to the Council's *core principle* analysis. The College's basic point is that the benefits and protections offered by the HPA have already been provided for under the MPA.

The Council agrees with the College that there is a great deal of consistency between the two statutes. However, rather than emphasizing the need for a separate statute, the Council believes that this consistency demonstrates that, in many respects, the basic structures of governance are essentially the same under both statutes and governance under an umbrella statute will not necessitate any significant changes for the profession at large.

In the next part of this section, the College notes its primary areas of objections to the HPA. Most of these matters have already been addressed in other parts of this report. Essentially, the Council agrees with the College with respect to several of the deficiencies in the present HPA, though on some issues, such as the rule-making power under section 19(5) and (6) [*18(5) and (6)*] of the HPA, the Council has set out its position that the HPA more properly reflects the *core principles* of professional regulation. Nevertheless, the Council would like to reiterate its position on the specific objections raised by the College in respect of the HPA:

1. The College reiterates its arguments regarding the power given to the Lieutenant Governor in Council to amend or impose rules unilaterally as provided in section 19(5) [*18(5)*] of the HPA. The Council amply discusses this issue under the heading "Accountability Mechanisms", above, at pages 26 to 35, and indicates that this section is entirely consistent with the principles of professional self-regulation.

2. The College is strongly opposed to a legislative definition of sexual and professional misconduct. While bylaw 48 of the HPA which defines professional misconduct no longer exists, the Council agrees with the College that the terms "sexual misconduct" and "professional misconduct" should remain flexible.

3. The College also perceives procedural difficulties with HPA processes, for example, the reporting mechanism to the College council (the board) contemplated by section 34(1) [*33(1)*] of the HPA. The Council agrees that this requirement is too onerous.

4. The Council dealt with several of the concerns with the MPA processes above under the heading "Complaint and Disciplinary Process". For example, on the argument of the College that rule 177 of the MPA requires members to co-operate with the College or any committee in its review of any matter, the Council notes that under the MPA it is the registrar and his or her staff that is responsible for the majority of investigations, and there are no express requirements regarding the conduct of such investigations. Further, the Council agrees that the registrar should be given broad powers to dispose of cases in the first instance, but it proposes that in lieu of "minor complaints" the registrar's discretion whether to take further action should be circumscribed by criteria such as "trivial, frivolous, vexatious, etc.". Finally, with regard to a right to an internal appeal, regardless of the practice the College may follow, it is far from clear whether there is a right to an internal appeal under the MPA or its Rules.

5. The College is opposed to mandatory penalties such as revocation. This issue refers to former bylaw 48(3) of the HPA which is not included in the new version of the HPA Bylaws, and has not been considered by the Council.

6. The College also repeats its objection to giving the inquiry committee the right to determine the penalty. The Council recommends that the decision on penalty be a matter for the committee conducting disciplinary hearings, not the College council. First, the body which conducts the hearing and hears and receives the evidence is best placed to determine the appropriate penalty. Second, empowering the College council to make decisions on penalty creates the potential for overlap between the various disciplinary functions as the College council is also responsible, in the first instance, for appointing an inquiry committee.

7. Finally, the College objects to affording its council a right of appeal from decisions of the inquiry committee. In the Council's view this issue is essentially moot since the Council recommends above, at pages 21 to 22, that determination of penalty must be exercised by the inquiry committee, not the College council.

D. THE HEALTH PROFESSIONS COUNCIL'S CONCLUSION REGARDING DESIGNATION

As noted in the introduction to this report, in determining whether a profession should be designated under the HPA the Council must balance the extent to which the present professional statute embodies the *core principles* of professional regulation and whether there are unique features about the profession or other relevant factors that justify the continuing need for a separate statute.

After reviewing the College's submission on the general issue of designation, the Council does not believe the College has presented any compelling reasons to justify the retention of a separate statute. However, the Council sees merit in many of the College's points regarding deficiencies in the HPA and advantages of the MPA. The Council includes an account of these issues in the section on "Improvements to the Health Professions Act". The Council generally believes that designation of the profession would serve the public interest, particularly in light of the public policy justifications for uniform legislation. However, that recommendation must be qualified. Specifically, the Council does not believe that designation of the medical profession under the **current** HPA is in the public interest. Unless government amends the HPA to provide for improvements identified by the Council in this report, the Council believes that the current MPA is a better regulatory structure for the medical profession. Should the government determine that the current MPA remain, however, the Council emphasizes that it must be amended to address the deficiencies in the MPA which the Council has noted in its *core principle* analysis.

III. RECOMMENDATION

The Health Professions Council makes a qualified recommendation to the Minister of Health and Minister Responsible for Seniors that the Medical Practitioners Act be repealed and the medical profession be designated under the Health Professions Act, provided the Health Professions Act is amended to provide for improvements identified in this report. Alternatively, if the Medical Practitioners Act is retained as a separate statute the Health Professions Council recommends that it be amended to address the deficiencies the Health Professions Council has noted in this report.

Appendix: The Terms of Reference and the Criteria and Guidelines.

For the Appendix *Terms of Reference and Guidelines*,
please refer to the Appendix in Part II, Volume 1 – Legislative Review

HEALTH
PROFESSIONS
COUNCIL

NATUROPATHS ACT LEGISLATIVE REVIEW REPORT (PRELIMINARY)

February 1998

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NATUROPATHS ACT LEGISLATIVE REVIEW REPORT (PRELIMINARY)

A. Introduction

This is the preliminary report of the legislative review of the Naturopaths Act (the NA) conducted by the Health Professions Council (the Council).

The review was conducted pursuant to the Terms of Reference issued by the Minister of Health and Minister Responsible for Seniors in accordance with section 24, now section 25 of the Health Professions Act (the HPA).*

The Terms of Reference direct the Council to review the governing statutes for each of ten health professions, of which naturopathy is one.

The Nature of the Review

The purpose of the review as set out in the Terms of Reference is twofold:

(a) To determine whether designation of the health profession under the HPA would be in the public interest or whether there are unique features of the health profession, or other relevant factors, that justify a continuing need for a separate statute.

(b) To determine what amendments, if any, are required to the current statute, rules, regulations and bylaws for each profession to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core*

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*During the early drafting of this Report statute references were based on RSBC 1979 and Amendments. For ease of reference, the current provisions are indicated in brackets next to the old citations. The current versions refer to the Health Professions Act, RSBC 1996, Chapter 183, and the Naturopaths Act, RSBC 1996, Chapter 94.

> *principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference.

The Terms of Reference and the Criteria and Guidelines which expand upon them are included as an Appendix to this report.

The Council's primary task in conducting the legislative review is to determine whether it is in the public interest that a health profession be designated under the HPA. The analysis of whether the professional statute contains the *core principles* of professional regulation is an important element in the consideration of whether designation is in the public interest. The extent to which a professional statute currently embodies these *core principles* is clearly one of the factors the Council must consider in making this determination.

However, the *core principle* analysis is not the only factor that must be considered. The Terms of Reference reflect a general policy that designation under the HPA is the favoured option. They refer to the desirability of minimizing the number of statutes that govern the health professions and the importance of a high degree of consistency amongst statutes. The Terms of Reference also direct the Council to consider specifically whether there are unique features of a health profession or other relevant factors that justify a separate statute. Thus, the onus is on the profession to establish why a separate statute is in the public interest.

In summary, in determining whether a profession should be designated under the HPA the Council must consider, first, the extent to which the current professional statute embodies the *core principles* of professional regulation and, second, whether there are unique features about the profession or other relevant factors that justify the retention of a separate statute.

The Council would like to clarify at the outset that throughout the legislative review process it has received various submissions to the effect that designation under the HPA is tantamount to government "taking over" the professions. That is simply not the case. The HPA still relies on a system of self-regulation. Professions regulated under the HPA still have colleges, and still have a broad rule-making power. Indeed, the basic structure of the HPA is remarkably similar to the current professional statutes. Thus, while there is some difference between provisions of the HPA and the current professional

statutes, the HPA clearly embodies a strong commitment to the principle of self-regulation.

The Process for the Review

The general process for the review provides for an initial meeting with the profession, preparation by the Chair of the Council of a comparative analysis of the profession's current statute with the HPA, discussion of the analysis with the profession, drafting of a preliminary report, discussion of the preliminary report within the Council, consultation meetings and a final report.

The Council Chair met with representatives of the professional association, the British Columbia Naturopathic Association (BCNA) and the regulatory body, the Association of Naturopathic Physicians of British Columbia (ANPBC), on May 8, 1995 to discuss the review process.

The Chair then completed the comparative analysis of the NA and the HPA, and in a letter dated February 26, 1996, provided the BCNA and the ANPBC with a detailed summary of the analysis of the NA. The ANPBC and the BCNA were asked to provide responses to a number of questions and to describe the unique features of naturopathy, or any other relevant factors, that justified the retention of a separate statute. The BCNA provided written submissions while the ANPBC made no submissions. The Chair did, however, meet with representatives of the ANPBC on December 18, 1996, to discuss the general issue of designation under the HPA.

The Chair then completed this preliminary report which will be circulated to all health professions and other interested parties upon request.

The Naturopaths Act

In 1921, naturopathic physicians, then known as "drugless physicians", were brought within the provisions of the Medical Act of 1886. The term "naturopathy", or "drugless healing", was not defined. The Naturopathic Physicians Act of 1936 repealed the provisions of the Medical Act entitling "drugless physicians" to be registered on the B.C. Medical Register, and established naturopathic physicians as a self-regulating profession in British Columbia. A Board of Naturopathic Physicians was given the powers of licensure and discipline over naturopathic physicians.

Under that Act, the ANPBC was established to carry out functions as a licensing and regulatory association. The naturopathic profession was included in the BC Workers' Compensation Act of 1951, and with the inception of the Medical Grant Act in 1965, naturopathic medicine has been included in the provincial health care scheme. Various amendments have been made to the Naturopaths Act over the years, most recently in 1993 when the present duties and object clause, enhanced inspection powers and interim suspension powers were added.

B. Executive Summary

The Health Professions Council has conducted a comparative analysis of the NA with the HPA and the *core principles* of professional regulation.

After reviewing the analysis and considering the *core principles* of professional regulation embodied in the HPA and discussed in the Terms of Reference, the Council has determined that designation of the profession of naturopathy under the HPA would be in the public interest. In the Council's view, the general policy favouring designation, the numerous deficiencies in the present statute, and the lack of compelling reasons justifying a separate statute, support its recommendation that designation is in the public interest.

C. Discussion of Issues

The Council's primary focus in conducting this review is to determine whether designation of the profession of naturopathy under the HPA would be in the public interest, and a key element of this task is to determine whether the NA contains the *core principles* of professional regulation reflected in the HPA and discussed in the Terms of Reference.

The Council has determined that it would be in the public interest for the profession of naturopathy to be designated under the HPA and proposes to discuss its conclusion by considering first, whether the NA contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference, and second, whether there is a need for a separate statute.

At the outset, however, the Council would like to make some general comments about its review of the NA. First, the Council's task was complicated somewhat by the ANPBC's failure to respond to the preliminary analysis. In its response the BCNA indicated that it would defer to the ANPBC regarding questions 20 - 52 which concern the complaints and discipline process and accountability mechanisms. Since no response was forthcoming from the ANPBC, the Council's analysis of these issues was completed without the benefit of submissions from the body responsible for administering the statute. This is unfortunate as the ANPBC could have provided some useful input regarding its regulatory mandate.

The second point concerns the tone of the BCNA's submission. In several places, the BCNA takes the position that since regulation is for the benefit of the public, the government should absorb the cost of any regulatory mechanisms it wishes to impose. For example, in response to a question about creating a committee to prevent misconduct of a sexual nature, the BCNA stated:

> ...while such a programme would be useful, it questions the need for the ANPBC to establish the programme, and asks why the government cannot establish such a programme and make it available to the health professions. If one of the issues of this review is to address public interest and safety, surely it is in the public interest for the government to set up and manage such

general programmes, rather than rely on health professions to individually carry out such objectives.

In the Council's view, the BCNA's position on this matter is based on a fundamental misunderstanding of the nature of self-regulation. The Council will be discussing this issue further under the heading "Whether There is a Need for a Separate Act". For now, the Council simply notes that the power to self-regulate is a privilege, not a right, and it is up to each individual regulatory body to act in the public interest and fulfil its statutory mandate.

Self-regulation is a social contract between the profession and the public. Government grants a profession certain rights, such as for naturopaths the exclusive right to use a title, in return for which the profession agrees to regulate the profession in the public interest. In short, the Council believes that some of the BCNA's comments fail to appreciate the privileged status self-regulated professions enjoy, and the corresponding duties and obligations imposed upon them.

(1) DOES THE NATUROPATHS ACT CONTAIN THE *CORE PRINCIPLES* OF PROFESSIONAL REGULATION?

The Council compared the NA and the rules and bylaws made pursuant to the NA with the HPA, and prepared a detailed list of questions which was sent to the BCNA and the ANPBC. The BCNA provided responses to some of the questions. It deferred to the ANPBC on questions it felt were best answered by the latter, and in particular on questions related to complaints and discipline and accountability mechanisms. As stated, the ANPBC did not make any submission.

Also, the Council understands that the BCNA has submitted a draft of proposed changes to the NA Rules and consequential amendments to the NA for Cabinet approval. However, these changes have not been approved. Therefore, this Report is based on the present version of the NA and its Rules. The Council will make references to the proposed draft of the NA Rules as relevant issues arise.

Schedule B to the Terms of Reference organizes the *core principles* of professional regulation under five headings. The Council proposes to discuss this issue by considering each of those headings in turn.

(a) Mandate of the Regulatory Body

Schedule B of the Terms of Reference emphasizes two issues under this heading:

- barriers to interdisciplinary practice are not in the public interest; and
- it is important that there be a clear separation between the professional association and the regulatory body.

Both of these points were discussed by the Seaton Commission in its report "Closer to Home". Regarding interdisciplinary practice the Commission stated:

> In addition to broadly stated scopes of practice, there are other barriers to practice. For instance, there is no reason why a member of one profession should not be allowed to be a member of another profession. A provision in any regulation, rule, by-law or Code of Ethics which prevents this from happening is inappropriate. It may be in the profession's interest to have such a prohibition, but it is not in the public interest.
>
> Some of the existing professional legislation makes it an offence for a member of a college to work in association with someone who is not a member of that college. But as long as the non-member does not practice within the profession's narrow scope of practice, the commission does not believe there is any substantial reason why a member of a college should not be allowed to work in cooperation or partnership with someone who is not a member. In fact, a multi-disciplinary practice may be beneficial and should be encouraged.

With respect to the relationship between the regulatory body and the professional association, the Commission recommended that two separate bodies be created for all regulated and licensed professions so that there is a clear separation of membership promotion functions and licensing and discipline functions. The Seaton Commission felt that without this separation the public protection function of the College would become blurred with the membership promotion function of the professional association.

The Seaton Commission's views echo those of an earlier Report into health care entitled "Health Security for British Columbians, Special Report: Consumer Participation, Regulation of the Professions, and Decentralization" (the Foulkes Report). In a chapter on public regulation and the professions, Professor J.T. McLeod stated:

> It is only reasonable to recognize that professions, like other groups and individuals in society, may well be expected to have certain private self-interests of their own which are not coincident with the public interest. Recognition of a degree of real or at least potential conflict between the private interest of the profession and the public interest is the root of the necessary distinction between the professional or licensing body on the one hand, whose purpose is to enforce standards of quality and service, and the voluntary association of the profession on the other hand, whose legitimate function is to advance the particular interests of the profession and its membership. This important distinction between the public function of the licensing body and the private function of the voluntary association is now widely recognized in Canada. From the standpoint of both the professions and the public, it is desirable that the separation of the two functions be kept sharp and distinct.

The Council agrees with these comments. Barriers to interdisciplinary practice are not in the public interest, and it is important that there be a clear separation between the professional association and the regulatory body.

1. The Council considered the NA in light of these *core principles* and asked the BCNA and ANPBC several questions related to the mandate of the regulatory body. The BCNA indicates its substantial agreement with the Council's comments, including its strong approval of the notion that there must be a clear separation between the regulatory body and the professional association. The Council notes that the BCNA was created in 1993 upon the initiative of the ANPBC, in order to split the regulatory and advocacy roles of the profession and to provide the government and the public with a clear demarcation of their separate functions. The BCNA also noted its agreements with the following points the Council made regarding mandate of the regulatory body:

- Section 51 [*52*] of the HPA which provides that a board may apply to the Supreme Court for an interim or permanent injunction to restrain a person from contravening the act, the regulations or its bylaws.

- Section 23 [*24*] of the HPA which provides for immunity from liability for acts or omissions done in good faith by the board or members acting on behalf of or under the direction of the board or college.

- Part 4 of the HPA which sets out provisions for the regulation of health profession corporations.

In short, the BCNA offers no objection to the HPA provisions related to the mandate of the regulatory body.

2. The Council also notes that the NA does not contain a provision such as section 17(1) [*18(1)*] of the HPA which states that,

> A board shall govern, control and administer the affairs of its college in accordance with this Act, the regulations and the bylaws.

In the Council's view, a professional statute should contain such a section.

3. Finally, the Council notes that the BCNA is concerned that the legislative review may lead to a larger bureaucratic structure, rather than a simpler and more effective one. In general, the BCNA approves of any modifications which ensure public safety and/or increased responsiveness to the public interest. But the BCNA is concerned that additional committees and increased administration will result in increased costs to the regulatory boards and therefore increased costs to the members in each health profession. The Council appreciates this concern, especially for smaller professions such as naturopathy, and will discuss this issue further under the heading "Improvements to the HPA".

(b) Registration Requirements for Entry into the Profession

Schedule B to the Terms of Reference makes three important points under this heading. First, natural justice and fairness must be reflected in the admission criteria and application process for newly graduated and foreign trained applicants. Second, there must be objective requirements for registration and accreditation of education programs. Third, applicants should have appropriate rights of appeal affecting registration decisions.

In considering this issue, the Council had some concerns about the registration process under the NA.

1. The Council asked the BCNA about Rule 32(2) of the NA which provides that the registrar, as chair of the credentials committee, shall inquire into the moral character of an applicant. Although the Council was concerned that the term "moral character" injects a significant degree of discretion into the decision making process, it recognizes the need for such provision and is satisfied that it does not violate the *core principles* of professional regulation. Indeed, the Council takes note of the fact that the notion of "good moral character" is well established in many other professional regulatory statutes. Of course, it is essential that the discretionary power afforded the ANPBC through the use of this term be exercised with utmost consistency and fairness.

2. The Council notes that the BCNA offers no response to its question regarding rights of appeal to the Supreme Court from a refusal of registration, from a denial of opportunity to take the examination, and from failing an examination. The BCNA feels that this issue is best addressed by the ANPBC, which, as noted, did not make a submission.

The registration system under the NA provides that all applications are first received by the registrar. The registrar, as chair of the credentials committee, inquires into the applicant's moral character and qualifications for membership and reports to the board. If approved, the applicant is then entitled to undertake examinations administered by the examining board. Under the NA and rules, applicants are entitled to appeal to the board a decision to deny an applicant the opportunity to take an examination or the failure of an examination.

The HPA process is slightly different in that the registration committee is responsible for registering applicants. In the Council's view, with some minor changes the HPA could accommodate the basic process for registration of naturopaths were they to be designated under the HPA.

However, the Council is concerned with the appeal rights under the NA. Section 6 [*8*] of the NA provides:

> **6.** Every order or decision of the board refusing an application for registration under this Act or cancelling or suspending the registration of a naturopathic physician may be appealed to the Supreme Court. Ten days notice of the appeal must be served on the board and a copy of it must be filed with the registrar of the court not later than one month after the date of the order or decision. The court must deal with the appeal in a summary manner, and its decision is final. The costs of the appeal are in the discretion of the court.

Section 35 of the NA Rules states:

> Appeal to the Board
>
> 35. Any applicant denied the opportunity for examination may appeal such ruling to the board, and the decision of the board on such appeal is final.

On its face, the reference to "final" decision in section 35 of the rules seems inconsistent with section 6 [*8*] of the statute. It is of course a general principle in public law that where a provision in delegated legislation is inconsistent with the statute, the statutory provision governs. However, in the Council's view these provisions have the potential to create some confusion regarding the nature of appeal rights under the NA. The HPA and the *core principles* make it clear that an external right of appeal is an important part of a professional statute. Such a provision is embodied in section 19(3) [*20(4)*] of the HPA, which provides:

> **20**(4) A person whose application for registration as a member of a college is refused by the registration committee may appeal the refusal to the Supreme Court and, for this purpose, the provisions of section [*39*] 40 respecting an appeal from a decision of the discipline committee apply to an appeal under this section.

In the Council's view, a professional statute ought to contain a clear right of external appeal for registration decisions.

4. Section 39 [*40*] of the HPA deals with the procedure for appeals of Discipline Committee decisions to the Supreme Court. They include the time limits for filing an appeal and for serving the petition to specified persons, the form the appeal may take, and the different decisions the Court may hand down after the hearing. The decision of the Supreme Court may be appealed to the Court of Appeal if leave of the court is granted by a justice of the Court of Appeal. The NA does not set out the procedural rules for appeals in such a detailed fashion.

In the Council's view, section 39 [*40*] of the HPA better sets out the appropriate appeal rights for persons seeking registration.

5. The Council is also concerned about the scope of judicial review under section 6 [*8(3)*] of the NA which provides that an appeal shall be heard in a summary manner. In contrast, section 39(8) [*40(8)*] of the HPA provides that an appeal must be a new hearing if there is no transcript of the proceeding in which the decision being appealed was made, or must be a review of the transcript, unless the court finds that a new hearing or the admission of new evidence is necessary in the interests of justice.

In summary, in the Council's view, the appeal provisions regarding registration decisions under the NA are not in accordance with the *core principles*.

(c) Quality Assurance Mechanisms

Under this heading, Schedule B of the Terms of Reference states that there should be effective mechanisms for monitoring practitioner competency including the ability to set continuing education requirements, and a committee of the board should be responsible for reviewing standards of practice and codes of ethics.

1. The Council is very concerned about the BCNA's response to its question about section 2.1(2)(f) [*3(2)(f)*] of the NA which provides that the board has the object of establishing a patient relations program to seek to prevent professional misconduct of a sexual nature. In its response, the BCNA states:

> [The BCNA] questions the need for the ANPBC to establish the programme, and asks why the government cannot establish such a programme and make it available to the health professions. If one of the issues of this review is to address public interest and safety, surely it is in the public interest for the government to set up and manage such general programmes, rather than rely on health professions to individually carry out such objectives.

Thus, the BCNA not only avoids the question about whether the regulatory body of the profession has fulfilled its mandate under section 2.1(2)(f) [*3(2)(f)*] of the NA, but it questions the need for such a section in the first place.

The Council is disturbed with this response which indicates a fundamental misunderstanding of the nature of self-regulation. Self-regulating professions occupy a privileged position in society, one that must always be exercised in the public interest and in accordance with the statutes under which such power is granted. By enacting section 2.1(2)(f) [*3(2)(f)*] the government has indicated that it feels it is important for the naturopathic profession to establish such a program in order to fulfil its public interest mandate. The existence of a self-regulating body for its profession hinges on its ability to act in accordance with the public interest. Self-regulation requires the carrying out of the duty to provide mechanisms such as the patient relations program.

2. The Council received no information in response to its questions regarding codes of ethics and standards of practice. The question stated:

> Sections 2.1(2)(d) and (e) of the NA provide that the association's objects include responsibility for standards of practice and ethics. One of the core principles of the legislative review is that a committee of the board should be responsible for reviewing the standards of practice and code of ethics and circulating new practice guidelines and bulletins to members. Has the board created a committee with similar functions, and what objection would you would have to including in the NA provision for the establishment of such a committee?

In the absence of a response the Council can only assume that such mechanisms are lacking for the profession of naturopathy, and their absence is in violation of the *core principles*. However, the Council acknowledges that the

BCNA has included a code of professional ethics in its proposed changes to the NA Rules.

(d) Complaint and Disciplinary Process

A review of the HPA and the principles outlined in schedule B to the Terms of Reference indicates that a designated health profession's complaints and discipline process must, at a minimum, incorporate certain key elements:

- the investigative and adjudicative bodies must be made up of different people and the bodies administered independently;
- dissatisfied complainants and registrants must be afforded rights of appeal;
- the process must be consistent with the rules of natural justice, and provide for proper notice of a proceeding and a right to be heard; and
- the process must not be complex: complainants and registrants must understand how the process works.

The Council had several concerns regarding the complaints and discipline provisions in the NA. The ANPBC which is responsible for administering these provisions did not provide the Council with any submissions. However, the BCNA did make some general comments regarding the complaints and discipline process found in the NA. It stated:

> A general point which the BCNA feels is important, and which we have raised with the ANPBC, is the protocol of investigations. Whatever resolve is reached through the legislative review, we ask that the complaint and investigation process be clearly delineated for both public and professionals. We have asked, for example, for a flow chart indicating how a complaint is dealt with once received by the regulatory board, what obligations a doctor has during the investigative procedure, what options are available to him/her, and so forth. From our perspective, the problem with complaint,

> investigation and discipline has not been the conduct of investigators or the regulatory board, but rather consistency in procedure.

Thus, there appears to be a general concern within the profession regarding the processing of complaints.

The Council understands the BCNA's concern over the complaints and discipline process found in the NA, and notes the following general problems:

> First, the board is involved in all stages of the complaint process.
>
> Second, it does not appear that the investigative process is separate from the adjudicative process.
>
> Third, the NA does not contain a provision that sets out the procedural requirements for the inquiry (investigative) committee, as can be found in sections 32(3) and (4) [*33(5) and (6)*] of the HPA.

On the basis of these issues alone, the Council is of the view that the complaints and discipline process under the NA is inadequate, and clearly not in accord with the *core principles* of professional regulation.

(e) Accountability Mechanisms

1. Schedule B to the Terms of Reference, under the heading Accountability Mechanisms, states that there should be a requirement for government approval of rules or bylaws. Such a provision is embodied in section 18(3) [*19(3)*] of the HPA. Further, section 18(5) [*19(5)*] of the HPA provides that the Minister may request a board to amend or repeal an existing bylaw or make a new bylaw for the college if the Minister is satisfied that this is necessary or advisable. Section 18(6) [*19(6)*] of the HPA provides that where a board does not comply with a request under section 18(5) [*19(5)*], the Lieutenant Governor in Council may amend or repeal the existing bylaw for the College or make the new bylaw for the College.

Although the NA contains a provision requiring government approval of bylaws, it does not contain provisions such as sections 18(5) [*19(5)*] and 18(6) [*19(6)*] of the HPA. The BCNA has no objection to such provisions.

2. Section 21 [*22*] of the HPA calls for open access to the register. The BCNA objects to this provision on the basis that its present register contains various personal information of registrants such as home phone numbers and addresses. The Council understands the privacy concerns raised by the BCNA, but is of the view that such issues can be addressed quite easily through the design and operation of the register. In the Council's view it is important that a regulatory body keep an up to date record of members' names and business addresses as well as their registration status and that this be available to the public.

Clearly, the purpose of providing such public access to the register is not for the disclosure of the members' private information. Rather, section 21 [*22*] is for the public to verify which members of a health profession are in good standing. This purpose was discussed in the 1994 Manitoba Law Reform Commission Report entitled "Regulating Professions and Occupations", at page 58:

> A register of names will reveal the names of all practitioners who are currently licensed or certified to provide a regulated service. It should also include information concerning current suspensions, conditions on practice or probationary terms under which a practitioner is allowed to practise. We believe that this information will help to protect the public from individuals who are practising without a current license or who are falsely claiming to be certified. It will increase the likelihood that these individuals will be detected and deterred. Such information should be freely available to the public and to government.

Further, the Council notes that section 21 [*22*] has certain safeguards such as section 21(b) [*22(b)*] which sets out restrictions for the unwarranted use of information accessed through the register; for example, the use of the information for commercial purposes.

(f) General Conclusions from Comparative Analysis

After a careful review of the NA and the NA Rules, the Council is of the view that the legislation regarding the profession of naturopathy is inconsistent in several material aspects with the *core principles* of professional regulation. On some important issues, notably those related to the complaints and discipline process and quality assurance mechanisms, the Council found several provisions to be inadequate, incomplete or missing having regard to the *core principles* embodied in the HPA and discussed in the Terms of Reference.

(2) IS THERE A NEED FOR A SEPARATE ACT?

The Council proposes to address this issue by discussing the general policy favouring designation and the profession specific arguments regarding designation.

The general policy favouring designation

As stated in the introduction to this report, the Terms of Reference reflect a general policy that designation is the preferred option, and that a profession must **justify** a continuing need for a separate statute. The Council would like to expand on this important issue.

Under the existing regulatory system, each profession is governed by its own professional statute. The terminology used as well as the regulatory structures and processes created vary widely from profession to profession, especially with respect to the complaints and discipline process. This variation and resulting complexity is confusing to the public and registrants. In the Council's view, a uniform regulatory system under the HPA would eliminate much of the complexity and confusion, and foster the development of a common jurisprudence for the health professions.

Several recent reports of Royal Commissions and government policy statements in several provinces have emphasized that an integrated approach to the delivery of health care is in the public interest. Coordination and cooperation amongst health care providers is of fundamental importance to such an approach, and in the Council's view, a uniform regulatory structure enhances the government's ability to apply health care policy in a consistent manner.

One policy initiative for which coordination and consistency is particularly relevant is the scope of practice review process the Council is currently conducting. The Ministry has requested that the Council review the scopes of practice of the existing professions with a view to implementing a new regulatory framework for health professions in British Columbia. The key elements of the new framework are broad, non-exclusive scope of practice statements and narrowly defined reserved acts. Reserved acts are those elements of a profession's scope of practice which present such a significant risk of harm that they should be reserved to a particular profession that is qualified to perform them. The new system will create shared scopes of practice, and many of the reserved acts will be shared amongst particular professions. In the Council's view, a uniform regulatory structure would ease the implementation of the new model of professional regulation.

A general policy favouring a uniform regulatory structure was referred to in the report of the Seaton Commission on Health Care in BC. The following excerpts are from that part of the Commission's report which deals with regulation of the health professions:

> There is a lack of consistency among the 16 provincial acts that govern the health care professions, despite the fact that all of the colleges established under the acts have the same legislative mandate: to protect the public from preventable harm. Such inconsistency increases the likelihood of variations in judicial interpretations of the acts. Underlying this situation are persistent jurisdictional disputes and a distinct lack of cooperation among the health care professions.
>
> ...
>
> In general, a lack of consistency characterizes the acts with respect to complaints, discipline and appeals, resulting in insufficient public accountability, no uniformity in the structure or organization of the different statutes, and an absence of common terms.
>
> ...

> The Health Professions Act has the potential to influence significantly the future of self regulation of health care professions. Under this new Act, the Health Professions Council can make recommendations to the minister concerning which groups should be granted self-regulation status, their titles, and the extent of their scopes of practice, if any. The Act could be used to create uniform legislative procedures.

These views led the Commission to conclude that the existing health professions acts be repealed and the HPA be revised to serve as the umbrella act for regulating health professions.

The general policy of legislative uniformity is also consistent with initiatives in several other provinces, notably Ontario which has implemented umbrella legislation for the health professions and Alberta which is in the process of enacting umbrella legislation.

The Council agrees with these statements about the desirability of uniformity in legislation and accepts that, as a general rule, designation under the HPA is the preferred option. This general policy favouring designation is embodied in the Terms of Reference which refer to the desirability of a "high degree of consistency between statutes" and of "minimiz[ing] the number of statutes that apply to the governance of health professions". Indeed, the Terms of Reference and attached Criteria and Guidelines make it clear that the Council is to consider whether there are unique features of the profession or other relevant factors that justify a need for a separate statute.

However, the Council again emphasizes that although the policy preference is for uniform legislative structures, the HPA model still embodies a strong commitment to self-regulation through the "college" system of regulation.

With this in mind, the Council proposes to review the arguments presented by the BCNA which it submits justify the continuing need for a separate statute.

The profession specific arguments regarding designation

First, the BCNA submits that naturopathic medicine has a unique philosophy, which, if the profession lost its separate act, would lead to the profession being subsumed by and confused with any number of other alternative health professions which are fundamentally different from naturopathy. In this regard, the BCNA believes that naturopathy is unique in that it presents an alternative to the allopathic medical philosophy that influences most health care professions.

Second, the BCNA claims that naturopathy is the only health profession dedicated to the treatment of the entire individual, thereby avoiding fragmented health care resulting from a high degree of specialization.

Third, the BCNA is sceptical that there are any tangible benefits to inclusion in the HPA. It asks, "what does our profession gain by inclusion in the HPA?" The BCNA further states that it feels inclusion under an umbrella act is a slight to the profession's individuality, uniqueness and historical right to self-regulation.

Lastly, the BCNA contends that the public interest in alternative health medicine and a revolutionary awareness in the public regarding health, fitness and diet puts the naturopathic profession in the best position to deliver beneficial aspects of alternative health care to the public.

In the Council's view, these points fail to address the fundamental issue raised by this review which is whether naturopaths should be governed under the HPA or continue to operate under a separate statute. The Council has no doubt that naturopathy is a unique profession that treats the entire individual, and that the public is interested in alternative health care. However, the Council's question regarding designation was intended to raise the issue of how these unique characteristics **justify** the retention of a separate statue. In other words, the naturopaths were asked to relate their unique characteristics to the issue of how they are regulated. In the Council's view, they have failed to do this. **In particular, the BCNA has failed to indicate how the unique characteristics of naturopathy cannot be accommodated under the regulatory structure set out in the HPA.**

Further, the Council believes that underlying the BCNA's response is an inaccurate view of the HPA. The BCNA clearly sees designation under the HPA as a "slight" to the profession. The issue of self-regulation under the HPA was discussed in the introduction to this report but some of these comments bear repeating here. In particular, the Council cannot emphasize enough that the HPA still relies on a system of self-regulation, and that professions regulated under the HPA still have colleges, and still have a broad rule-making power. The Minister has asked the Council to consider whether the public interest favours self-regulation of the profession under the HPA. In short, designation is not in any way intended as a slight to a profession. Indeed, the Council notes that several professions with a long tradition of self-regulation, such as the Massage Therapists and the Physical Therapists, already regulate themselves under the HPA.

In summary, the Council is of the view that the BCNA has not presented any persuasive reasons which justify the continuing need for a separate statute.

(3) THE COUNCIL'S CONCLUSION REGARDING DESIGNATION

As noted in the introduction to this report, in determining whether a profession should be designated under the HPA the Council must balance the extent to which the present professional statute embodies the *core principles* of professional regulation and whether there are unique features about the profession or other relevant factors that justify the continuing need for a separate statute.

In considering this matter, the Council believes that the legislation regarding naturopathy is for the most part inconsistent with the *core principles* of professional regulation. Further, in the Council's view, the arguments regarding the need for a separate statute are not persuasive. Therefore, the Council recommends that the profession of naturopathy be designated under the HPA.

(4) IMPROVEMENTS TO THE HPA

In the course of its review of the NA, the Council has determined that there is one issue upon which the HPA could be improved to provide for the regulation of naturopathy. Also, the Council expects that further improvements to the HPA will come to its attention as it proceeds through the review process for each of the existing professions. The Minister has asked that the Council's final report deal with all professions, and the Council intends to include in the report a comprehensive list of suggested improvements to the HPA.

As noted above, the BCNA is concerned that creating additional committees will increase administration and result in rising costs to the regulatory boards, and therefore, rising costs to the members in each health profession.

Section 18(1)(r) [*19(1)(t)*] of the HPA provides that a board may, by bylaw, create a registration committee, a quality assurance committee, an inquiry committee, a discipline committee, a patient relations committee and other committees a board determines are necessary or advisable. Although this section indicates that the creation of such committees is discretionary, the scheme of the HPA makes it clear that a board must, at a minimum, have in place a registration, inquiry and discipline committee. The Council does not believe that the creation of three committees for matters as important as registration, inquiry and discipline to be an onerous task for a profession. Indeed, in the Council's view, the public interest requires that a profession which wishes to regulate itself in the public interest must form such committees.

With respect to the programs administered by what would otherwise be the patient relations or quality assurance committees, while ideally a separate committee should be responsible for such matters, the Council believes that it may be appropriate for a college board to handle such matters, particularly where the profession is small and does not have sufficient resources to staff such committees. The Council recommends that when designating a profession under the HPA, the Minister be sensitive to the size and resources of a profession when considering which committees must be established.

(5) OTHER ISSUES

(a) Naturopathic Pharmacopoeia.

An issue which has perplexed the profession of naturopathy in British Columbia since its inception is the creation of a Naturopathic Pharmacopoeia.

The issue arises from the wording of the present legislation governing naturopaths.

Section 5(1)(o) [*7(1)(o)*] of the NA states:

> [w]ith the approval of the Lieutenant Governor in Council and subject to this Act, the board may make rules as follows:
>
> ...
>
> (o) providing for a schedule of preparations and medicines to be authorized for use by naturopathic physicians registered under this Act.

Section 10 [*13*] of the NA identifies certain practices which are prohibited under the NA:

> Nothing in this Act authorizes a person to prescribe or administer drugs for use internally or externally, except the preparations and medicines defined in regulations made by the board, with the approval of the Lieutenant Governor in Council...

Drugs are not defined under the NA. However, the definition used in the Pharmacists, Pharmacy Operations and Drug Scheduling Act clearly includes both substances which require a prescription and those which do not.

The combined effect of these provisions is that naturopaths are prohibited from prescribing or administering any preparations or medicines other than those defined under section 5(1)(o) [*7(1)(o)*] of the NA and approved by the Lieutenant Governor in Council. Despite repeated requests from the naturopaths, no schedule of preparations and medicines has ever been approved. Thus, it would appear that under current legislation naturopaths may not prescribe or administer any preparations or medicines.

This lack of approval has frustrated naturopaths for many years. In its scope of practice submission, the BCNA stated:

> Naturopathic physicians have called for the application of this statutory directive for countless years.
>
> ...

> Successive provincial governments have declined to regulate a schedule of preparations and medicines. At the same time, such governments have not repealed the provision under the Naturopaths Act regarding the schedule of preparations and medicines provision.
>
> ...
>
> Naturopathic physicians and their patients are prejudiced by the failure of successive provincial governments to provide a schedule of preparations and medicines under the Naturopaths Act.

In 1992, the Ministry established terms of reference for a review committee to examine the approval of a pharmacopoeia for use by naturopathic physicians. The review committee achieved substantial agreement on most substances for inclusion in a schedule of preparations and medicines. However, the Committee ran into problems as a result of internal disagreements. No consensus was achieved because the College of Physicians and Surgeons refused to endorse any schedule of preparations and medicines for use by naturopathic physicians that referred to substances included or proposed to be included in Schedule "F" of the regulations under the federal Food and Drugs Act.

Thus, the situation remains unchanged and it would appear that naturopaths are severely limited in the substances they may employ in practice.

The Council is not prepared at this point to discuss specific substances which should or should not be included on the list. That sort of issue is better left to the Council's scope of practice review process which is currently underway. However, the Council would like to point out that, in its view, many of the problems surrounding the Naturopathic Pharmacopoeia will be resolved once the government implements the new shared scope of practice model reflected in the Terms of Reference for the Scope of Practice Review.

In the new system, scope of practice statements will not be exclusive but professions may be granted reserved acts. Reserved acts are those elements of a profession's scope of practice which present such a significant risk of harm that they should be reserved to a particular profession, or shared amongst particular professions. In the new system only reserved acts will be regulated.

Acts which do not qualify as reserved acts will be in the public domain, and may be performed without restriction.

The Council has recently released a position paper regarding the shared scope of practice model which contains the Council's proposed list of reserved acts. The only proposed reserved act which has some relevance to the issue of the Naturopathic Pharmacopoeia states:

> **Prescribing, compounding, dispensing or administering by any means a drug listed in Schedule A-1 or A-3.2 of the Pharmacists, Pharmacy Operations and Drug Scheduling Act.**

The effect of this proposal would be that only substances which require a prescription (Schedule A to the provincial Pharmacists, Pharmacy Operations and Drug Scheduling Act which incorporates Schedule "F" of the federal Food and Drugs Act) and substances which are sold "behind the counter" (non-prescription drugs that must be sold from the restricted area of a pharmacy) would be reserved. The use of substances not falling within this act, for example herbal remedies which do not appear on Schedule F, would not be restricted.

The new shared scope of practice model will of course require that certain steps be taken in order that it be implemented. One such step in the Council's view, will be the repeal of section 10 [*13*] of the NA which will no longer be necessary since the regulatory model will have changed. In other words, in the Council's view, the legislation governing naturopaths should not restrict the substances that may be employed by naturopaths unless they fall within the reserved act described above. Thus, in the new regulatory model a pharmacopoeia setting out all substances naturopaths may use will be unnecessary. The only substances which will need to be listed will be those falling within the reserved act set out above. The Council is aware, however, that certain of the substances proposed for use by naturopaths fall within the reserved act, and as noted, that issue will be deferred to the Council's scope of practice review process.

(b) The Name of the Regulatory College

Another issue that should be addressed is the name of the regulatory body for naturopathy. Currently, the regulatory body for naturopathy is called the ANPBC which stands for "Association of Naturopathic Physicians of British Columbia". The Council understands that the ANPBC has requested that the government change its name to the "College of Naturopathic Physicians of British Columbia" to avoid confusion. The Council agrees with the ANPBC that the name may be confusing, particularly since the professional association for naturopathy is called the "British Columbia Naturopathic Association". It has become a tradition among health professions to give their regulatory body a name that identifies it as a "college", such as the College of Physicians and Surgeons, while the membership organization is usually identified as an "association", such as the British Columbia Medical Association.

Therefore, the Council recommends that the name of the regulatory body for the naturopathic profession be changed from "Association of Naturopathic Physicians of British Columbia" to the "College of Naturopathic Physicians of British Columbia", thereby eliminating any possible confusion.

D. Recommendation

The Health Professions Council recommends to the Minister of Health and Minister Responsible for Seniors that the Naturopaths Act be repealed and the profession of naturopathy be designated under the Health Professions Act.

Appendix: The Terms of Reference and the Criteria and Guidelines.

**For the Appendix *Terms of Reference and Guidelines*,
please refer to the Appendix in Part II, Volume 1 – Legislative Review**

HEALTH
PROFESSIONS
COUNCIL

NURSES (REGISTERED) ACT LEGISLATIVE REVIEW REPORT

(PRELIMINARY)

February 1998

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NURSES (REGISTERED) ACT LEGISLATIVE REVIEW REPORT (PRELIMINARY)

A. Introduction

This is the preliminary report of the legislative review of the Nurses (Registered) Act (the NRA) conducted by the Health Professions Council (the Council).

The review was conducted pursuant to the Terms of Reference issued by the Minister of Health and Minister Responsible for Seniors in accordance with section 24, now section 25, of the Health Professions Act (the HPA).*

The Terms of Reference direct the Council to review the governing statutes for each of ten health professions, of which registered nursing is one.

The Nature of the Review

The purpose of the review as set out in the Terms of Reference is twofold:

(a) To determine whether designation of the health profession under the HPA would be in the public interest or whether there are unique features of the health profession, or other relevant factors, that justify a continuing need for a separate statute.

(b) To determine what amendments, if any, are required to the current statute, rules, regulations and bylaws for each profession to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference.

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*During the early drafting of this Report statute references were based on RSBC 1979 and Amendments. For ease of reference, the current provisions are indicated in brackets next to the old citations. The current versions refer to the Health Professions Act, RSBC 1996, Chapter 183, and the Nurses (Registered) Act, RSBC 1996, Chapter 335.

The Terms of Reference and the Criteria and Guidelines which expand upon them are included as an Appendix to this report.

The Council's primary task in conducting the legislative review is to determine whether it is in the public interest that a health profession be designated under the HPA. The analysis of whether the professional statute contains the *core principles* of professional regulation is an important element in the consideration of whether designation is in the public interest. The extent to which a professional statute currently embodies these *core principles* is clearly one of the factors the Council must consider in making this determination.

However, the *core principle* analysis is not the only factor that must be considered. The Terms of Reference reflect a general policy that designation under the HPA is the favoured option. They refer to the desirability of minimizing the number of statutes that govern the health professions and the importance of a high degree of consistency amongst statutes. The Terms of Reference also direct the Council to consider specifically whether there are unique features of a health profession or other relevant factors that **justify** a separate statute. Thus, the onus is on the profession to establish why a separate statute is in the public interest.

In summary, in determining whether a profession should be designated under the HPA the Council must consider, first, the extent to which the current professional statute embodies the *core principles* of professional regulation and, second, whether there are unique features of the profession or other relevant factors that justify the retention of a separate statute.

The Council would like to clarify at the outset that throughout the legislative review process it has received various submissions to the effect that designation under the HPA is tantamount to government "taking over" the professions. That is simply not the case. The HPA still relies on a system of self-regulation. Professions regulated under the HPA still have colleges, and still have a broad rule-making power. Indeed, the basic structure of the HPA is remarkably similar to the current professional statutes. Thus, while there is some difference between provisions of the HPA and the current professional statutes, the HPA clearly embodies a strong commitment to the principle of self-regulation.

The Process for the Review

The general process for the review provides for an initial meeting with the profession, preparation by the Chair of the Council of a comparative analysis of the profession's current statute with the HPA, consultation with the profession regarding the analysis, drafting of a preliminary report, discussion of the preliminary report within the Council, consultation meetings and a final report.

The Council Chair met with representatives of the Registered Nurses Association of British Columbia (the RNABC) on April 24, 1995 to discuss the review process.

The Chair then completed the comparative analysis of the NRA and the HPA, and provided the RNABC with a detailed summary of the analysis. The British Columbia Nurses' Union (BCNU) was also provided with a copy of the analysis. The RNABC and the BCNU were asked to provide responses to a number of questions and to describe the unique features of the nursing profession, or any other relevant factors, that justified the retention of a separate statute. The Council also met with a representative of the BCNU on May 8, 1997.

The Chair then completed this preliminary report which will be circulated to all health professions and other interested parties upon request.

The Nurses (Registered) Act

Registered nursing has been a self-regulating profession in British Columbia since the passage of the Registered Nurses Act in 1918. That Act established the Graduate Nurses Association of B.C. as the body responsible for regulating registered nursing. The name was changed to the Registered Nurses Association of B.C. by changes to the Act in 1935. Numerous amendments have been made to the statute since then, including most recently in 1993 pursuant to the Health Professions Statute Amendment Act. The 1993 amendments included an updated duties and objects clause, enhancement to the college's inspection powers and interim suspension powers.

B. Executive Summary

The Health Professions Council has conducted a comparative analysis of the NRA with the HPA.

After reviewing the analysis and considering the *core principles* of professional regulation embodied in the HPA and discussed in the Terms of Reference, the Council has determined that designation of the profession of registered nursing under the HPA would be in the public interest. In the Council's view, the general policy favouring designation and the lack of compelling reasons justifying a separate statute support its recommendation that designation is in the public interest.

C. Discussion of Issues

The Council's primary focus in conducting this review is to determine whether designation of the profession of registered nursing under the HPA would be in the public interest, and a key element of this task is to determine whether the NRA contains the *core principles* of professional regulation reflected in the HPA and discussed in the Terms of Reference.

The Council has determined that it would be in the public interest for the profession of registered nursing to be designated under the HPA and proposes to discuss its conclusion by considering first, whether the NRA contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference, and second, whether there is a need for a separate statute. The Council also intends to make some recommendations regarding possible improvements to the HPA.

(1) DOES THE NURSES (REGISTERED) ACT CONTAIN THE *CORE PRINCIPLES* OF PROFESSIONAL REGULATION?

Schedule B to the Terms of Reference organizes the *core principles* of professional regulation under five headings. The Council proposes to discuss this issue by considering each of those headings in turn.

(a) Mandate of the Regulatory Body

Schedule B of the Terms of Reference makes two important points under this heading:

- barriers to interdisciplinary practice are not in the public interest; and
- it is important that there be a clear separation between the professional association and the regulatory body.

Both of these points were discussed by the Seaton Commission in its report "Closer to Home". Regarding interdisciplinary practice the Commission stated:

> In addition to broadly stated scopes of practice, there are other barriers to practice. For instance, there is no reason why a member of one profession should not be allowed to be a member of

> another profession. A provision in any regulation, rule, by-law or Code of Ethics which prevents this from happening is inappropriate. It may be in the profession's interest to have such a prohibition, but it is not in the public interest.
>
> Some of the existing professional legislation makes it an offense for a member of a college to work in association with someone who is not a member of that college. But as long as the non-member does not practice within the profession's narrow scope of practice, the commission does not believe there is any substantial reason why a member of a college should not be allowed to work in cooperation or partnership with someone who is not a member. In fact, a multi-disciplinary practice may be beneficial and should be encouraged.

With respect to the relationship between the regulatory body and the professional association, the Commission recommended that two separate bodies be created for all regulated and licensed professions so that there is a clear separation of membership promotion functions and licensing and discipline functions. Without this separation, the Seaton Commission felt that the public protection function of the College would become blurred with the membership promotion function of the professional association.

The Seaton Commission's views echo those of an earlier Report into health care entitled "Health Security for British Columbians, Special Report: Consumer Participation, Regulation of the Professions, and Decentralization" (the Foulkes Report). In a chapter on public regulation and the professions, Professor J.T. McLeod stated:

> It is only reasonable to recognize that professions, like other groups and individuals in society, may well be expected to have certain private self-interests of their own which are not coincident with the public interest. Recognition of a degree of real or at least potential conflict between the private interest of the profession and the public interest is the root of the necessary distinction between the professional or licensing body on the one hand, whose purpose is to enforce standards of quality and service, and the voluntary association of the profession on the other hand, whose legitimate function is to advance the particular interests of the profession and its membership. This important distinction between the public function of the licensing body and the private function of the voluntary association is now widely recognized in Canada. From the standpoint of both the professions and the

> public, it is desirable that the separation of the two functions be kept sharp and distinct.

The Council agrees with these comments. Barriers to interdisciplinary practice are not in the public interest, and it is important that there be a clear separation between the professional association and the regulatory body.

With these comments in mind, the Council notes the following regarding the *core principles* related to Mandate of the Regulatory Body.

1. The Council has some concern about the fact that the NRA does not clearly provide for a separation between the regulatory and professional functions of the nursing profession, and it requested that the RNABC address this issue in its submissions. The RNABC submits that the relevant *core principle* does not require a clear separation of the professional from the regulatory functions, but only that "one function must not taint the other function".

The RNABC further states that since the late 1970's the BCNU handles the economic regulation of the profession, including fee setting and collective bargaining. Additionally, the RNABC states that it conducted a program review in 1993 which resulted in further divestment of membership related functions. With respect to the general issue of such involvement, the RNABC states:

> Any promotion of professional interests is now only pursued when it is clearly compatible with the public interest. The most obvious mutual interest is in safe and quality nursing care. Promotion of the profession is also pursued to the extent that it educates and informs the public about the profession, its duties and standards.

The RNABC also outlines the three aspects of its policy development function: (1) policies affecting nursing practice; (2) policies affecting the health care system generally; and (3) policies which broadly contribute to people's health. The RNABC states that these policy roles are entirely consistent with its public interest mandate and, in fact, are subject to it. Finally, the RNABC states that these functions in no way compromise its regulatory role.

Having carefully reviewed this issue, the Council is satisfied that the RNABC's involvement in what may be characterized as membership promotion functions is not inconsistent with its regulatory mandate. In this regard, the Council notes the following:

First, it is clear that matters related to the promotion of members' economic interests are now handled by the BCNU.

Second, all of the RNABC's activities are subject to its general duty, set out in section 2(1)(a) and (b) [*3(1)(a) and (b)*] of the NRA, to act in the public interest at all times. Although the RNABC also has a separate constitution, it states that the RNABC must maintain a non-partisan position in carrying out its objects. The effect of these provisions is that the RNABC's activities are always subject to its overriding duty to act in the public interest.

Third, with respect to health policy and promotion, the Council notes that the present scope of practice of nursing as set out in the rules pursuant to the NRA states, in part:

> "practice of nursing" means the performance for others of health care services which require the application of professional nursing knowledge and skills and includes
>
> a) promoting, maintaining or restoring the health of the general public,
>
> ...

In other words, health policy and promotion fall within the scope of practice of nursing and is properly within the mandate of the RNABC.

Having said this, the Council emphasizes that the issue of separation of membership promotion and regulatory functions is a serious issue and, in the area of nursing, one that requires a delicate balance. In the Council's view, the RNABC must be particularly scrupulous in ensuring that its membership promotion and policy functions do not compromise its duty to serve the public interest, nor appear to do so.

Further, the Council notes that it has become standard practice in health profession regulation to refer to the body responsible for membership promotion as the "association", while the regulatory body is known as the "college". Clearly, the RNABC's primary role is regulation of the profession, and in the Council's view, the name of the Association should be changed to the "College of Registered Nurses of B.C." to reflect this mandate.

2. The Council is also concerned about the RNABC's involvement in educational programs. The Council notes that there is a potential for conflict

between the interests of the profession and the public in this regard. This matter was discussed in the Foulkes Report:

> [T]he inherently monopolistic nature of licensing can lead to a strain between the profession and the public with regard to restrictive practice and limited entry to the profession. In some jurisdictions, doubts have arisen as to whether the licensing authority has been altogether fair in its consideration of the qualifications of foreign trained practitioners. This does not appear to have been a serious problem in British Columbia. However, difficulties may arise with regard to domestic health personnel.

More particularly with respect to nursing, the potential for conflict was noted by the Seaton Commission in its report. The Seaton Commission rejected the RNABC's submission that a Bachelor of Science in Nursing degree should be a minimum requirement for entry to the profession by the year 2000. In the Commission's view, there was little doubt that the majority of registered nurses practising in the province - diploma RN's - are competent, valuable nurses.

Further, on the general issue of entry and practice standards, the Manitoba Law Reform Commission in its report, "Regulating Professions and Occupations", stated at page 43:

> Some respondents felt that practitioners should be able to continue to set their own entry and practice standards. The primary reason given for this view was that only practitioners would have the expertise to set those standards appropriately.
>
> This argument places great faith in the ability of practitioners to act in the public interest. In many cases, this faith may be justified. However, it must be recognized that practitioners are not disinterested in this process. Entry and practice standards will affect the level of competition for a service and the price for performing it. The standards set therefore directly affect the well-being of practitioners of the service. Allowing them to set these standards unilaterally would therefore place them in a conflict of interest.

This led the Commission to recommend that the task of establishing entry and practice standards be taken away from the professional body entirely, and placed in the hands of a governmental body. While the Council does not favour such a drastic measure, this excerpt underscores the potential for conflict in this area.

In light of these comments, the Council requested clarification from the RNABC regarding the following provisions in the NRA:

- section 20(1) [*27(1)*] which empowers the board to approve or reject the establishment of a school of nursing;
- sections 7(1)(a) and (b) [*9(2)(a) and (b)*] which enable the board to make rules regarding the curricula and standards of schools of nursing and qualifications for admission to an approved school of nursing;
- section 21 [*28*] which states that the board must be satisfied of an applicant's qualifications before she or he may be admitted to an approved school of nursing; and
- Part 9 [*3*] of the NRA Rules which sets out a system for the approval of schools of nursing.

The RNABC states that setting educational requirements for entry into a profession and assuring that new entrants are prepared to meet the standards of the profession are central to the successful regulation of a profession. The Council agrees with this assertion but believes that the provisions referred to above go far beyond what is necessary to fulfil what the RNABC has correctly described as its regulatory mandate with respect to educational programs.

The Council accepts the general need for provisions such as those in Part 9 of the NRA Rules which set out a system for the approval of schools of nursing. However, in the Council's view a regulatory body's role in "approval" of educational programs should be limited to approval for the purposes of registration. A regulatory body should not be given the power to determine whether a school can exist at all. Such a power is effectively granted to the RNABC under section 20 [*27*] of the NRA, and in the Council's view this goes beyond the proper role of a regulatory body. This is particularly so in the case of section 20 [*27*] because the section is not limited to registered nursing but extends to all fields of nursing, including, presumably, registered psychiatric nursing and licensed practical nursing. While section 9.1 [*3.1*] of Part 9 [*3*] of the NRA Rules defines "nursing education program" as "a program of basic education preparatory to registration as a registered nurse member..." (emphasis added), thereby implying that the Rules are applicable only to education programs concerning registered nurses, this Rule does not take away from the broad terms found in the NRA.

Similarly, the Council believes that section 7(1)(b) [*9(1)(b)*] of the NRA, which empowers the board to make rules regarding qualifications for admission to approved schools of nursing, and section 21 [*28*], which mandates that the board must be satisfied of an applicant's qualifications before she or he may be admitted to an approved school of nursing, are beyond the proper scope of the mandate of a regulatory body. While it is certainly appropriate for a regulatory body to regulate the entry of professionals into practice, it is not necessary or desirable for the regulatory body to have such a role in the admission of applicants to educational programs.

In short, while the Council emphasizes that it accepts the need for a regulatory body's power to approve of educational programs for registration purposes, it believes the current powers of the board under the NRA are too broad and have the potential to create barriers to entry to the nursing profession.

However, the Council does not believe it is in the public interest simply to remove such powers from the RNABC without ensuring that some body is responsible for approving schools of nursing. The solution may be to have the RNABC act in an advisory capacity to government which will have the final decision-making power.

3. The Council also notes that the NRA does not contain a provision such as section 17(1) [*18(1)*] of the HPA which states that,

> A board shall govern, control and administer the affairs of its college in accordance with this Act, the regulations and the bylaws.

In the Council's view, a professional statute should contain such a section.

4. Finally, regarding mandate of the profession, the RNABC agrees to the following points the Council made in its comparative analysis:

> First, it agrees to the inclusion of section 51 [*52*] of the HPA which grants the regulatory body the power to apply to the Supreme Court for an interim or permanent injunction to ensure compliance with the statute.
>
> Second, it agrees to the inclusion of part 4 [*4*] of the HPA regarding the regulation of professional corporations.

(b) Registration Requirements for Entry into the Profession

Schedule B to the Terms of Reference makes three important points under this heading. First, natural justice and fairness must be reflected in the admission criteria and application process for newly graduated and foreign trained applicants. Second, there must be objective requirements for registration and accreditation of education programs. Third, applicants should have appropriate rights of appeal affecting registration decisions.

The Council has already discussed the issue of educational programs. However, it has some additional concerns regarding the registration process in the NRA.

1. The Council requested clarification from the RNABC regarding various registration criteria set out in the NRA. For example, section 12(2)(b) [*14(2)(b)*] of the NRA requires that registrants be of "good character and be fit to engage in the practice of nursing". The Council notes that "good character" does not appear in the HPA but is included in the current draft HPA bylaws (HPA Bylaws 47(1)(d)).

The Council's concern about this provision was that it may violate one of the *core principles* discussed under registration requirements - namely that requirements for registration must be objective. The difficulty with a term such as "good character" is that it injects a significant degree of discretion into the decision making process. Nonetheless, after considering the RNABC's submissions, the Council recognizes the need for such a provision and is satisfied that it does not violate the *core principles* of professional regulation. Indeed, the Council takes note of the fact that the notion of "good character" is well established in many other professional regulatory statutes. Of course, it is essential that the discretionary power afforded the RNABC through the use of this term be exercised with utmost consistency and fairness.

2. In its preliminary analysis the Council asked the RNABC whether the present registration process should be replaced by the process set out in the HPA. The RNABC submits that it employs a different mechanism for registering members. Although the HPA directs that one registration committee undertake this task, the NRA employs three entities: the registration committee, the membership review committee and a board of examiners. The RNABC notes that it has approximately 35,000 members and, for the most part, registers applicants through its rules and policies.

The RNABC indicates that registration is generally an administrative process, and that applicants who meet the prescribed criteria are registered. Under the NRA Rules, the Executive Committee or its designate may approve applications for registration, and all other applications are sent to the Registration Committee. The RNABC indicates that only a small portion of applications for registration are handled by the Registration Committee.

The Council agrees with the RNABC that requiring a committee to review all applications for membership is not an efficient or effective use of its resources, and that some modification of the HPA process in this regard would be appropriate. The Council will discuss this matter further under the heading "Improvements to the HPA".

3. In its preliminary analysis the Council noted that the NRA contains no external right of appeal regarding registration matters. Section 19(3)[20(4)] of the HPA provides for such an appeal right. The RNABC submits that it has established an internal appeal mechanism and that in its view, there is no need for an appeal to the Supreme Court. The Council disagrees with this contention. The HPA, and indeed most professional statutes, contain a specific provision granting a refused applicant a right of appeal to the Supreme Court. As previously noted, the Minister has indicated that the HPA embodies the *core principles* of professional regulation. In the Council's view, entry to practice issues are of fundamental importance and require an external right of appeal.

(c) Quality Assurance Mechanisms

Under this heading, Schedule B of the Terms of Reference states that there should be effective mechanisms for monitoring practitioner competency, including the ability to set continuing education requirements, and a committee of the board should be responsible for reviewing standards of practice and codes of ethics.

In its submission, the RNABC outlines in detail its programs related to standards of practice and ethics. It notes that it issues practice guidelines and a code of ethics, and revisions as they are made. The RNABC also endorses the codes of ethics of both the Canadian Nurses Association and the International Council of Nurses, and is involved in a project aimed at updating the codes of ethics. Finally, the RNABC also describes its nurse-client relations program which seeks to prevent professional misconduct of a sexual nature. In the Council's view, the College clearly indicates substantial compliance with this *core principle*.

The Council would also like to comment briefly on the issue of continuing education. In the Council's view, continuing education is only part of the greater goal of ensuring quality practice. Recent developments in this area indicate that it is far from clear whether continuing education is the best way to achieve the goal of continued competence. In this regard, the Council notes that the RNABC has undertaken a review of continuing competency with a view towards developing an appropriate quality assurance program for registered nursing. The Council also agrees with the RNABC's point that the *core principle* regarding mandatory continuing education merely requires the ability to set such education requirements, not their actual imposition.

(d) Complaint and Disciplinary Process

A review of the HPA and the principles outlined in schedule B to the Terms of Reference indicates that a designated health profession's complaints and discipline process must, at a minimum, incorporate certain key elements:

- the investigative and adjudicative bodies must be made up of different people and the bodies administered independently;
- dissatisfied complainants and registrants must be afforded rights of appeal;
- the process must be consistent with the rules of natural justice, and provide for proper notice of a proceeding and a right to be heard; and
- the process must not be complex: complainants and registrants must understand how the process works.

With these principles in mind, the Council asked the RNABC several questions about its complaints and discipline process.

In its response the RNABC states that the basic process employed by the RNABC in handling complaints is substantially similar to that employed by most self-regulated professions. There is a procedure for complaint intake, a review to determine whether to proceed to an investigation, an investigation, followed by a citation if warranted, a hearing with a resulting decision, and a procedure for an appeal of that decision.

The BCNU also made extensive submissions regarding the complaints and discipline process under the NRA which were prefaced with the following remarks:

> [T]he BCNU has been able to identify a number of serious and systemic short-comings with the NRA and the Association's rules and procedures. The BCNU has presented its concerns to the

> RNABC and, more recently, it has filed a formal complaint against RNABC with the Ombudsman. As a result of these initiatives, the BCNU has seen some improvements. However, we are concerned that there are legislative and administrative barriers which will halt further advancements in the RNABC's rules and procedures.

The Council carefully reviewed the NRA and Rules and the submissions of both the BCNU and the RNABC in light of the *core principles* of professional regulation. The Council is of the view that there are several points upon which the current complaints and discipline process is not consistent with the *core principles* of professional regulation:

1. First, the Council is not satisfied that there is a clear separation between the investigative and adjudicative process, as mandated by the HPA.

Under the NRA, both the investigative and adjudicative functions are conducted under the auspices of the Professional Conduct Committee. The chair of the Committee is responsible for authorizing investigations. The investigation is then carried out by a staff investigator, and the investigator is required to report the results of the investigation to the Chair. The Chair is then responsible for deciding whether a disciplinary hearing should be conducted. Section 8.5(1) [*7.6(1)*] of the NRA Rules provides that in making this determination the Chair may consult with the Advisory Committee which is composed of one public member and one member. Inquiries are conducted by panels of the Professional Conduct Committee, and the Chair of the Committee may not sit as a member of a panel.

The RNABC submits that the investigative and adjudicative functions are separate, and that the process works well. The BCNU submits that the processes are not sufficiently separate and questions whether those who must decide whether to issue a citation should work in close cooperation with those who assess the merits of resulting disciplinary hearings. The BCNU supports the approach under the HPA stating that it would remove some of the BCNU's concerns for conflicts of interest and bias that it feels have occurred within the RNABC's current system under the NRA. The BCNU also notes that given the size of the profession there would be no difficulty for the RNABC to devise a mechanism that would provide for a clear separation between the investigation and the adjudication process.

In the Council's view, it is a fundamental principle of administrative law in professional discipline matters that the investigative and adjudicative functions remain separate. Those sitting in the hearing of a disciplinary matter must have no prior knowledge of the subject matter of the complaint or investigation, and this principle is embodied in the HPA. In the Council's view, there is a risk under the present NRA process that this will occur. The Council does not believe there is sufficient separation between the investigative and adjudicative functions under the NRA.

2. The Council is also not satisfied with the procedures regarding investigations under the NRA. In its preliminary analysis the Council made the following point:

> Sections 32(3) and (4) [*33(5) and (6)*] and bylaw 45 [*61*] of the HPA set out the procedural requirements for the inquiry (investigative) committee, including: notifying the parties of the investigation, the general nature of the information that the committee possesses, and the progress of the investigation; hearing from the registrant; and providing the parties with a written decision as soon as possible. Neither the NRA nor its rules refer to the procedure for investigations.

While the RNABC responded to this question, it did not address the issues of notifying and hearing from the respondent. The BCNU suggests that these issues should be included in the statute. The Council agrees. The procedural protections set out in section 32(3) and (4) [*33(5) and (6)*] of the HPA are basic minimum procedural rights and far from onerous to apply in practice.

3. The Council has a concern with section 35 [*50*] of the NRA which provides that the RNABC may terminate the membership of a member, summarily and without a hearing, who has been convicted of an indictable offence. The RNABC states that normally it does not suspend members under this section unless the offence is relevant to a member's suitability to practice. The RNABC contends that it would not object to adding a requirement that the offence be relevant to a member's suitability to practice.

The BCNU also made submissions regarding this section. It indicates that it would not object to adding a requirement that the offence be relevant to a member's suitability to practice. However, it goes on to state that the procedure is unfair in that the member is not given an opportunity to respond. It states, "[b]efore the convicted nurse's membership would be revoked, she must be given an opportunity to explain why that action should not be taken as a direct result of the nurse's conviction."

The Council agrees with the BCNU. In the Council's view, basic procedural fairness requires that a member be given an opportunity to respond to the issues. Further, the Council accepts both the RNABC's and the BCNU's concession that a requirement that the offence be relevant to a member's suitability to practise be imposed.

4. The Council has some concern regarding the RNABC's process for initial review of complaints.

Under s. 32(4)(a) [*33(6)(a)*] of the HPA, all complaints are sent to the registrar, who then refers them to an inquiry committee for investigation which must investigate all complaints. The inquiry committee may decide to take no further action because the matter is trivial, frivolous or vexatious or made in bad faith, or relates to conduct or competence that is found to be satisfactory, take appropriate steps to resolve the matter; or, refer the matter to a discipline committee.

The RNABC outlined its process in general terms. Initially, a staff member handles all calls regarding complaints. This person explains the procedures necessary to lodge a formal complaint, and if necessary, refers the caller to other authorities where the matter is outside the mandate of the RNABC. All formal complaints are forwarded to the Chair of the Professional Conduct Committee who then decides whether or not to launch an investigation. After an investigation is complete the Chair meets with two advisors in order to decide whether a formal disciplinary hearing will be held.

The RNABC sees no need to investigate all complaints and states that the process under the NRA is shorter and more flexible than that under the HPA. The BCNU states that in its view the HPA does not require that all complaints be investigated any more than the NRA presently does. Further, it submits that the NRA should be amended to include criteria as to when complaints can be dismissed.

With respect to the issue of investigating all complaints, the Council believes that much of this issue turns on the meaning of the word "investigation". Both the RNABC and BCNU imply that the term means an extensive review of the matter, including presumably contacting witnesses. But in the Council's view the term investigation has no special meaning. In many cases an investigation may consist simply of a few phone calls. The investigation must always be tailored to the specific matter under review.

Further, the Council also believes that the intention of the HPA is to allow for an initial screening of complaints by the Registrar. Although s. 32(4)(a) [*33(6)(a)*] states that all complaints must be investigated, it is prefaced by the words "[w]here a complaint is delivered" found in s.32(1) [*33(1)*], thus indicating that in some cases complaints will not be referred.

Additionally, the Council notes that the Registrar may also be designated as an inspector, pursuant to section 26(2) [*27(2)*] of the HPA, and the Registrar is mandated to deliver to the inquiry committee a copy of the complaint, an assessment thereof and any recommendations for the disposition of the complaint, according to section 31(2) [*32(2)*] of the HPA.

Nonetheless the Council appreciates both the BCNU's and the RNABC's submissions on this point, and believes that the initial intake process for complaints and the duty to investigate complaints under the HPA needs to be clarified. The Council intends to discuss this issue further under the heading "Improvements to the HPA".

5. The Council is also concerned about Rule 8.3(3) [*7.3(3)*] under the NRA Rules which provides that unless otherwise ordered by the Professional Conduct Committee, the identify of the complainant shall not be disclosed. No such provision exists under the HPA.

The RNABC submits that the identity of a complainant is irrelevant, and it is concerned that the effect of releasing complainants' identity would be a drop in the number of legitimate complaints as a result of fears of intimidation and coercion. The BCNU is strongly opposed to this provision. It states that the identity of a complainant is often highly relevant, and the anonymity prescribed by the NRA deprives the subject of a complaint of the right to assess what might be relevant and useful information for her or his defence. The BCNU also disputes the RNABC's point about intimidation, as in its view, this allegation is without factual foundation.

The Council accepts the BCNU's position regarding this matter. In the Council's view an absolute rule prohibiting disclosure of a complainant's identity is inconsistent with fundamental rules of fairness. Although the Council accepts that in certain cases, anonymity may be warranted such as where there is clear evidence of possible harm, anonymous complaints should be the exception, not the rule.

6. The Council has a concern regarding the procedures of a discipline hearing. In its preliminary analysis the Council noted the following:

> Section 37 [*38*] of the HPA sets out the procedure for a discipline committee hearing including the right of the respondent, the college and the complainant to appear as parties and be represented by counsel and full rights of cross examination and calling evidence in defence and reply. Section 25 [*41*] of the NRA sets out the procedure for hearings of the professional conduct

committee but does not contain all of the procedural rights set out in section 37 [*38*] of the HPA. Rule 8.14(2) [*7.14(2)*] of the NRA provides that the complainant is not entitled to participate as a party. (Section 22(4) [*30(4)*] of the NRA provides that members of the professional conduct committee have the powers of a commissioner under sections 12, 15 and 16 of the Inquiry Act when inquiring into the conduct of a member.)

In response, the RNABC simply notes its objection to the complainant appearing as a party and offered no objection to the basic procedures set out in the HPA.

The BCNU indicates its support for the adoption of the HPA process with the exception of the complainant appearing as a party.

In the Council's view, section 37 [*38*] sets out certain basic minimum fairness requirements and should be included in the professional statute. The issue of party status for a complainant will be addressed under the heading "Improvements to the HPA".

7. The Council notes that the RNABC and BCNU agree with several points it made regarding the complaints and discipline process, and neither group objects to the following HPA provisions:

- section 36 [*37*] which sets out the requirements for a notice of citation;
- sections 13 and 50 [*13 and 51*] which make it an offence for a member to violate his or her terms of registration;
- sections 30 and 50 [*31 and 51*] which make it an offence to obstruct an inspector in the lawful performance of his or her duties; and
- section 50(3) [*51(3)*] which prohibits prosecution of offences after twoz years.

In the course of considering the RNABC's and BCNU's submissions regarding the complaints and discipline process, the Council was persuaded that there were some matters upon which the present HPA could be improved. The Council intends to address these matters in a separate section of this report entitled "Improvements to the HPA".

(e) Accountability Mechanisms

1. Schedule B to the Terms of Reference, under the heading Accountability Mechanisms, states that there should be a requirement for government approval of rules or bylaws. Such a provision is embodied in section 18(3) [*19(3)*] of the HPA. Further, section 18(5) [*19(5)*] provides that the Minister may request a board to amend or repeal an existing bylaw or make a new bylaw for the college if the Minister is satisfied that this is necessary or advisable. Section 18(6) [*19(6)*] of the HPA provides that where a board does not comply with a request under section 18(5) [*19(5)*], the Lieutenant Governor in Council may amend or repeal the existing bylaw for the College or make the new bylaw for the College.

Under the current NRA the RNABC has been granted a broad rule-making power. Under section 9, the RNABC has the power to make rules "[f]or the better administration of [the] Act", and for many specific matters, including

(a) "curricula and standards of schools of nursing";

(b) "qualifications for admission to an approved school of nursing"; and

(c) "registration of persons wishing to become registered nurses".

Pursuant to section 9(5) only the rules related to licensed graduate nurses and to the curricula and standards of schools of nursing are subject to Cabinet approval. Thus, at present the RNABC has a very broad, unfettered rule-making power.

In its response to the Council, the RNABC indicates its preference for the current process for rule approval under the NRA, and its strong opposition to sections 18(5) and (6) [*19(5) and (6)*] of the HPA:

> Requiring government control over every substantive structural or process decision is the antithesis of self governance and undermines the concept of professional responsibility and accountability which is at the heart of any profession. Society does not look to professionals as a department of government, but as the repository of skills that are exercised independently of bureaucratic and political influence. A government's role must be limited to ensuring that the professions meet certain minimum standards of accountability, but that does not include "second guessing" every decision of the profession relating to its processes

> and standards of practice and ethics, in respect of which government has no particular expertise. It is the practising professionals themselves who are the best judge of what the practice standards should be.
>
> ...
>
> Having the authority to make rules is obviously in the public interest. Creating impediments to the rule making authority is not in the public interest and in the absence of evidence that the authority is being abused, it should not and need not be changed. The RNABC is vehemently opposed to the proposed system under which Cabinet makes Rules and imposes them whether or not the profession agrees with them.

The Council proposes to address this issue by first discussing the principles upon which self-regulation is founded.

It is well established that self-regulation is a privilege not a right. Government grants a profession certain rights, such as the exclusive right to use a title or perform certain services, in return for which the profession agrees to regulate the profession in the public interest. As the Seaton Commission stated:

> The purpose of regulating members of a profession is to protect the public from preventable harm. The privilege of self-regulation is granted to a profession by the provincial legislature. It is a social contract between the profession and the public. It is the property of the public the profession claims to serve.
>
> Self government is simply a delegation by the state of its regulatory authority in the professional sphere. (emphasis added)

The nature of the relationship between self regulatory bodies and the state was also addressed in the Foulkes Report:

> Thus it is clear that the principle of state primacy over professional decisions has been understood and established over a considerable period of time. In this manner it has been established that the state has not only a continuing and lively interest in the regulation of professions, but that the state has merely delegated to the professions the power of self-government as long as that power is exercised in a manner consistent with the public interest. The state has not abdicated its ultimate authority, but has established

> the primacy of public legislation over the private regulatory arrangements of the professions.

The government maintains fundamental control over self-regulatory bodies through the legislative process through which it can make, amend or repeal a statute. The government can, at any time, change the regulatory structure. Further accountability mechanisms are frequently enacted through provisions requiring open meetings, public membership on boards and committees, the duty to submit an annual report, and review by the Ombudsman.

The ability to review and scrutinize regulatory instruments is, in the Council's view, simply another means by which government supervises the grant of self-regulation.

The Foulkes Report discussed the general issue of accountability and stated:

> [M]ost jurisdictions not only insist that professional law must be public law, as passed by the legislature and reflecting public policy, but also insist that any by-laws, rules or regulations under professional statutes be reviewed by public authorities and if necessary revoked and repealed by the state. For example, since 1948 the Province of Saskatchewan has written into law the provision that any by-laws, rules or regulations passed by the governing council of a profession must be submitted to the Department of the Provincial Secretary within thirty days of being made, and that these by-laws, rules and regulations may be reviewed by the Legislative Assembly. If these supplementary regulations under the Act are found by the legislature to be beyond the power of the professional body, or to be prejudicial to the public interest, they may be revoked and repealed.

The Foulkes report commented on the lack of a mechanism for reviewing professional rules and regulations in British Columbia:

> [A]lthough there can be no doubt that the legislature has the power to amend professional statutes, at present there is no effective agency able to perform a careful, continuous, and detailed review of such statutes and professional regulations.

This led the Committee to recommend the creation of a tribunal to scrutinize regulations and revoke such regulations if necessary.

Clearly, the types of power set out in section 18 [*19*] of the HPA are not unusual.

The Council also notes that a provision requiring government approval of rules or bylaws is very common in professional legislation. In addition to the HPA, which already applies to several professions, section 5 of the Medical Practitioners Act, RSBC 1996, Chapter 285, states,

> (1) The council of the college must govern, control and administer the affairs of the college, and without limiting those powers, may make rules as follows:
>
> ...
>
> (4) A rule under subsection (1) has no effect until it is approved by the Lieutenant Governor in Council.

The Dentists Act, RSBC 1996, Chapter 94, contains a similar provision in section 28:

> (1) The council may make rules for the governing of the profession of dentistry, the college and registrants and for the carrying out of this Act.
>
> (2) No rule comes into force until approved by the Lieutenant Governor in Council.

Although a provision like section 18(6) [*19(6)*] of the HPA does not appear in any of the statutes related to the traditional professions, the Council notes that section 18 [*19*] currently applies to the several professions which regulate themselves under the HPA, many of which have a long history of self-regulation.

Further, the Council notes that a similar provision has been in place in Ontario for over 25 years.

Under the Ontario Health Disciplines Act (the HDA), which was enacted in 1973, most of the health professions' rule making power was subject to Ministerial review and Cabinet approval. In addition, that Act also gave the Minister the power to review and make, amend or revoke subordinate legislation. Section 3 stated:

> 3.--(1) It is the duty of the Minister to ensure that the activities of health disciplines are effectively regulated and co-ordinated in the public interest, to have appropriate standards of practice developed and ensure that these are maintained and to ensure that the rights of individuals to the services provided by health disciplines of their choice are maintained and to these ends to,
>
> (c) review proposals by a Council for changes in legislation or regulations of concern to that Council;
>
> .....
>
> (e) request a Council to make, amend or revoke regulations respecting any of the matters specified in its applicable Part...

The successor legislation to the HDA, the Regulated Health Professions Act (RHPA), contains similar provisions. Section 95 of the RHPA contains an extensive list of a regulatory body's rule making powers which are subject to Cabinet approval. Section 5(1)(c) of that Act provides that the Minister may,

> require a Council to make, amend or revoke a regulation under a health profession act or the *Drug and Pharmacies Regulation Act*...

Section 5(3) provides:

> If the Minister requires a Council to make, amend, or revoke a regulation under clause (1)(c) and the Council does not do so within sixty days, the Lieutenant Governor in Council may make, amend or revoke the regulation.

In short, in the Council's view section 18 [*19*] of the HPA is entirely consistent with the principles of self-regulation, the practice in other jurisdictions and indeed with the practice of other health professions in British Columbia. Section 18 [*19*] is not a challenge to professional self regulation nor does it undermine the principle of self governance. Rather, it is simply another accountability mechanism which underscores the notion that self-regulation is a privilege, not a right.

The Council does, however, see merit in portions of the RNABC's response to this issue, and will discuss possible changes to section 18 [*19*] under the heading "Improvements to the HPA".

2. Finally, regarding accountability mechanisms, the Council notes that neither the RNABC nor the BCNU have substantial objections to the following:

- Section 18(8) [*19(9)*] of the HPA which requires that the board must provide a copy of the bylaws to each registrant; and
- section 21 [*22*] which requires that the register and bylaws of the college be open to the public.

(f) The HPA Bylaws

The Terms of Reference direct the Council to conduct a comparative analysis of the HPA with each professional statute, along with any relevant rules, regulations or bylaws, in order to ensure that they contain the *core principles* of professional regulation. The Terms of Reference also indicated that the HPA embodies those *core principles* of professional regulation which the Minister considers are desirable or essential for regulating the profession in the public interest.

In the initial phase of the review process, the Council also considered the HPA draft bylaws. These bylaws are distributed to newly designated professions as a guide for drafting bylaws for their new regulatory colleges. Several questions in the Council's comparative analysis referred to the draft bylaws. The Council informed the professions that although the bylaws were not legally binding, they reflected the Ministry's view of provisions which were desirable for regulating a profession in the public interest.

During the review process, the original draft bylaws were substantially rewritten, and many provisions were removed and some added. This complicated the Council's process as its initial questions referred to the original draft of the bylaws. The revisions also underscored the fact that the bylaws were not legally binding, and subject to modification, making it somewhat difficult to assess which bylaw provisions embody *core principles* of professional regulation.

Nonetheless, many provisions appear in both versions of the draft bylaws, and are also consistent with the *core principles* discussed in the Terms of Reference. The Council felt it important to note where provisions in the NRA could be considered inadequate, incomplete or missing having regard to the draft bylaws. The Council has decided to include its account of such provisions in this separate section in order to reflect the fact that the bylaws have a different legal status than the HPA.

In its review of the NRA, the Council notes the following:

1. The RNABC does not object to the requirement for mandatory liability insurance as set out in bylaw 42 [*97*] of the HPA. The RNABC states that its current practice on the matter reflects the requirements found in bylaw 42. However, it requests that the provision on liability insurance omit a standard amount since appropriate coverage differs for different health professions. The Council accepts the RNABC's submission regarding amounts but maintains that the amount of $1 million set out in the HPA bylaw should be considered a minimum requirement.

2. Original draft bylaws 11 and 12, [*12(4)*] and 23 [*23(3)*] of the HPA, provide that meetings of the board of the college as well as all committee meetings must be open to the public. These provisions also create a discretion to close meetings in certain circumstances. Neither the RNABC nor the BCNU object to the inclusion of such provisions.

3. Original bylaws 13, 14, and 15 [*14, 15, and 16*] of the HPA provide that the registration, discipline and inquiry committees must have at least one third public members. The RNABC objects to the inclusion of such provisions. It states that such rules are not in accordance with its present committee structure, that significant delays may develop and that, regarding disciplinary matters, the issues under consideration are best judged by a panel of peers of the member who is the subject of the hearing. The BCNU, on the other hand, strongly supports these provisions. It believes that public membership is consistent with the RNABC's public interest mandate. The Council agrees with the BCNU on this point. The requirement of public representation on major committees improves public accountability and is in the public interest.

4. Section 32(4)(b) [*33(6)(b)*] of the HPA provides that the inquiry committee may take any action it considers appropriate to resolve a matter. Original bylaw 44 [*63*] provides for mediation of complaints. Both the RNABC and BCNU note that the NRA Rules currently provide for diversion agreements. Both indicate their support for alternative dispute resolution, but note that mediation may not be a broad enough term to encompass all forms of dispute resolution which may be considered. The Council strongly supports alternative dispute resolution and agrees with the submission of the BCNU and RNABC that mediation may not be a broad enough term. However, the Council agrees with the requirement in the draft bylaws that such resolutions not be made without the consent of the complainant.

(g) General Conclusions from Comparative Analysis

After a careful review of the NRA and Rules, the Council is of the view that the legislation regarding the profession of registered nursing is for the most part consistent with the *core principles* of professional regulation. However, on some important issues, notably those related to the complaints and discipline process and the mandate of the profession and accountability mechanisms, the Council found several provisions to be inadequate, incomplete or missing having regard to the *core principles* embodied in the HPA and discussed in the Terms of Reference.

(2) IS THERE A NEED FOR A SEPARATE ACT?

The Council proposes to address this issue by discussing the general policy favouring designation and the profession specific arguments regarding designation.

The general policy favouring designation

As stated in the introduction to this report, the Terms of Reference reflect a general policy that designation is the preferred option, and that a profession must **justify** a continuing need for a separate statute. The Council would like to expand on this important issue.

Under the existing regulatory system, each profession is governed by its own professional statute. The terminology used as well as the regulatory structures and processes created vary widely from profession to profession, especially with respect to the complaints and discipline process. This variation and resulting complexity is confusing to the public and registrants. In the Council's view, a uniform regulatory system under the HPA would eliminate much of the complexity and confusion, and foster the development of a common jurisprudence for the health professions.

Several recent reports of Royal Commissions and government policy statements in several provinces have emphasized that an integrated approach to the delivery of health care is in the public interest. Coordination and cooperation amongst health care providers is of fundamental importance to such an approach, and in the Council's view, a uniform regulatory structure enhances the government's ability to apply health care policy consistently.

One policy initiative for which coordination and consistency is particularly relevant is the scope of practice review process the Council is currently conducting. The Ministry has requested that the Council review the scopes of practice of the existing professions with a view to implementing a new regulatory framework for health professions in British Columbia. The key elements of the new framework are broad, non-exclusive scope of practice statements and narrowly defined reserved acts. Reserved acts are those elements of a profession's scope of practice which present such a significant risk of harm that they should be reserved to a particular profession that is qualified to perform them. The new system will create overlapping scopes of practice, and it is likely that many of the reserved acts will be shared amongst particular professions. In the Council's view, a uniform regulatory structure would ease the implementation of the new model of professional regulation.

A general policy favouring a uniform regulatory structure was referred to in the report of the Seaton Commission on Health Care in British Columbia. The following excerpts are from that part of the Commission's report which deals with regulation of the health professions:

> There is a lack of consistency among the 16 provincial acts that govern the health care professions, despite the fact that all of the colleges established under the acts have the same legislative mandate: to protect the public from preventable harm. Such inconsistency increases the likelihood of variations in judicial interpretations of the acts. Underlying this situation are persistent jurisdictional disputes and a distinct lack of cooperation among the health care professions.
>
> ...
>
> In general, a lack of consistency characterizes the acts with respect to complaints, discipline and appeals, resulting in insufficient public accountability, no uniformity in the structure or organization of the different statutes, and an absence of common terms.
>
> ...
>
> The Health Professions Act has the potential to influence significantly the future of self regulation of health care professions. Under this new Act, the Health Professions Council can make recommendations to the minister concerning which groups should be granted self-regulation status, their titles, and the extent of

their scopes of practice, if any. The Act could be used to create uniform legislative procedures.

These views led the Commission to conclude that the existing health professions acts should be repealed and the HPA revised to serve as the umbrella act for regulating health professions.

The general policy of legislative uniformity is also consistent with initiatives in several other provinces, notably Ontario which has implemented umbrella legislation for the health professions and Alberta which is in the process of enacting umbrella legislation.

The Council agrees with these statements about the desirability of uniformity in legislation and accepts that, as a general rule, designation under the HPA is the preferred option. This general policy favouring designation is embodied in the Terms of Reference which refer to the desirability of a "high degree of consistency between statutes" and of "minimiz[ing] the number of statutes that apply to the governance of health professions". Indeed, the Terms of Reference and attached Criteria and Guidelines make it clear that the Council is to consider whether there are unique features of the profession or other relevant factors that justify a need for a separate statute.

However, the Council again emphasizes that although the policy preference is for uniform legislative structures, the HPA model still embodies a strong commitment to self-regulation through the "college" system of regulation.

With this in mind, the Council proposes to review the arguments presented by the RNABC which it submits **justify** the continuing need for a separate statute.

The profession specific arguments regarding designation

The RNABC is strongly opposed to the designation of registered nursing under the HPA.

It first argues that the HPA is not suitable for regulating the practice of nursing. The RNABC states that the HPA is designed for smaller and emerging groups seeking to upgrade their status from an unregulated occupation to a regulated health profession. The Council disagrees with this assessment of the HPA. While the initial focus of the HPA may have been new and emerging professions, nothing in the HPA restricts its application to new professions. In any event, the Terms of Reference clearly indicate that the government is contemplating uniform legislation for the health professions, and has directed the Council to use the HPA as its template for assessing the quality of the existing professional statutes. The Council also notes that the basic structures in the HPA are very similar to those in the current NRA, and that the Seaton Commission recommended that a revised HPA serve as the umbrella statute for regulating health professions.

The RNABC also contends that the profession has a long history of regulation by RNABC, that nursing is a dynamic and diverse profession, and that nearly 100 years of innovation and evolution in the provisions of the NRA would be lost with no appreciable advantages to the public. The RNABC also notes that in a recent survey of its membership, 90% supported self-regulation.

In the Council's view, the RNABC is seriously overstating the effect of designation under the HPA. Implicit in its submission is the notion that somehow, designation under the HPA is tantamount to government administering the profession. That is simply not the case. The HPA is clearly based on the fundamental principle of professional self-regulation. Though the structures are somewhat different, the regulatory body, in this case the RNABC, is still responsible for regulating the profession, and still has comprehensive rule-making powers including the power, under section 18(r) [*19(1)(t)*] of the HPA to create any committees it deems necessary or advisable.

With respect to the RNABC's point about loss of precedent, the Council finds this issue difficult to evaluate in the absence of specific examples. And in any event, the Council does not believe that legislative amendment automatically nullifies existing precedent. Frequently, the Courts will rely on precedent under similar previous legislation in interpreting updated enactments. And further, the Council notes that judicial precedent which is inconsistent with government policy is frequently the reason for legislative change.

The RNABC further submits that nursing has proved over the course of years that it is an effective self-regulating profession accountable to the public, and that it has fulfilled its public interest mandate since the passage of the original NRA in 1918. The Council has no doubt that this is the case, and will continue to be the case regardless of the regulatory structure adopted. Contrary to a statement in a recent RNABC newsletter, the Council is not "wrestling with the level of trust it has in nurses' ability to regulate their profession". The RNABC's performance in carrying out its regulatory mandate is not the issue before the Council. The Council's Terms of Reference clearly indicate a public policy favouring uniform regulatory structures, and the real issue on this point is whether self-regulation under the NRA is to be preferred to self-regulation under the HPA.

In addition to its submissions regarding the suitability of the HPA, the RNABC states that there are several unique characteristics of the nursing profession which distinguish it from other professions. These include the following:

- Nursing is a large profession and has a broad scope of practice.
- Nurses are involved in promoting public health.
- Nursing has a broad rule-making power, and has developed a flexible complaints and discipline process.
- Nurses are generally employees, and for the most part unionized.
- Nursing has established a comprehensive policy framework to guide its regulatory activities with a focus on preventing poor practice and promoting good practice.

The Council agrees with the RNABC that the nursing profession is indeed unique. However, in this part of its analysis the Council had asked the RNABC to describe how this uniqueness **justifies** the retention of a separate statute. In other words, is the regulatory structure under the NRA any more compatible with these unique features than the HPA regulatory structures?

On this point, the basic thrust of the RNABC's submission appears to be that these unique features require a different regulatory model. In this regard, the RNABC cites its "PPI" model of regulation. This acronym describes the RNABC's role as promotion of good practice, prevention of poor practice, and intervention with unacceptable practice. The RNABC states that this model is different from the traditional "bad apple" approach to professional regulation, and allows it to engage in a wide range of activities in the public interest. The implication of this submission is that the HPA is somehow more suited to the traditional bad apple approach.

The Council believes that the RNABC has mis-characterized the HPA. While it is true that the HPA contains a detailed complaints and discipline process, the NRA and indeed all health professions' statues contain similar provisions. In fact the entire regulatory structure under the HPA is strikingly similar to the NRA structure. The HPA still provides for self-regulation. It also creates a "college" with the same duties and objects as the RNABC. It also grants the "board" of the college extensive rule-making powers in order to govern the profession in the public interest. While those powers are not as broad as the rule-making power under the NRA, they are still comprehensive, and include the powers:

- to establish standards, limits or conditions for the practice of the designated profession by registrants;
- to establish standards of professional ethics;
- to establish standards of education for registrants; and
- to establish a registration committee, a quality assurance committee, an inquiry committee, a discipline committee, a patient relations committee and other committees the board determines are necessary or advisable. (emphasis added)

Further, the Council notes that section 15(2)(d) [*16(2)(d)*] of the HPA states that a college has the object of establishing, monitoring, and enforcing standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice amongst registrants. In the Council's view, this section is entirely consistent with and supportive of the RNABC's "PPI" regulatory model.

The Council also notes that of the other two nursing professions in British Columbia, licensed practical nursing is already regulated under the HPA, and the governing body for registered psychiatric nursing has requested that its profession be regulated under the HPA. These professions also have many of the unique characteristics referred to by the RNABC, yet both appear to have agreed that the HPA is a desirable regulatory structure.

In the Council's opinion, the unique characteristics of nursing can be accommodated under the regulatory structure set out in the HPA, and the RNABC has failed to demonstrate how such characteristics favour the retention of a separate statute. The Council also notes that the BCNU has indicated its support, in principle, for designation under the HPA. However, the position of the BCNU is qualified by its suggestions for changes to the present HPA.

The Council would like to emphasize that it has absolutely no doubt that the RNABC has designed and implemented an excellent regulatory model to meet its obligation to protect the public interest. It also agrees that the RNABC has "proved over the years that it is an effective self-regulating profession accountable to the public". But as already noted, that is not the issue before the Council. Rather, the Council has been issued Terms of Reference which embody a clear policy preference for uniform legislative structures. The Council's task on this issue is to evaluate the profession's reasons justifying a separate statute. In the Council's views, the RNABC's submissions on this point are not persuasive.

(3) THE COUNCIL'S CONCLUSION REGARDING DESIGNATION

As noted in the introduction to this report, in determining whether a profession should be designated under the HPA the Council must balance the extent to which the present professional statute embodies the *core principles* of professional regulation and whether there are unique features about the profession or other relevant factors that justify the continuing need for a separate statute.

In considering this matter, the Council believes that several provisions in the NRA, notably those related to mandate of the regulatory body and the complaints and discipline process, are inadequate, incomplete or missing having regard to the *core principles* of professional regulation. Further, in the Council's view, the arguments regarding the need for a separate statute are not persuasive. Therefore, the Council recommends that the profession of registered nursing be designated under the HPA.

(4) IMPROVEMENTS TO THE HPA

In the course of its review of the NRA, the Council has determined that there are several matters upon which the HPA could be improved. These include the following:

1. Section 19(1) [*20(1)*] of the HPA provides that the Registration Committee is responsible for granting registration to applicants. The RNABC believes its model to be more effective than the one found in the HPA. The RNABC utilizes three entities in the regulation of the registration process: a registration committee, a membership review committee and a board of examiners. However, most of applicants are registered through a simple administrative process upon satisfaction of the applicable rules. The RNABC argues that it cannot possibly review all applications because of the size of its membership.

The Council agrees that for larger professions such as registered nursing, a committee need not consider every application. It is evident that the criteria for registration are well known and transparent, leaving nothing for the appropriate committees to ensure compliance with. Therefore, the Council recommends that section 19 [*20(1)*] of the HPA be modified to provide for a more flexible registration process, and in particular that the requirement that the registration committee review all complaints be removed.

2. Section 35 [*50*] of the NRA was referred to above. It provides that a nurse's membership may be terminated summarily and without a hearing upon conviction of an indictable offence. The Council recommended that notice must be given prior to any actions being taken under that section. The Council notes that section 34 [*35*] of the HPA contains a similar power. It states that the board of a college may take any action it considers appropriate to protect the public, including suspending a registrant pending an investigation or hearing of the discipline committee. Section 34 [*35*] does not require that any prior notice be given to the registrant. In the Council's view, it would be appropriate for this section to include a notice requirement and a chance to respond to the issues. While the Council accepts that a formal hearing requirement may not be appropriate given the nature of the power and the matters in issue regarding section 34 [*35*], the Council believes that natural justice requires that a registrant be given the opportunity to respond to the allegations. The Council recognizes however that there may be certain extreme cases involving substantial risk to the public where the powers need to be exercised without any prior notice to the registrant. Where action is taken without notice the registrant would of course, still be entitled to challenge the decision through the appeal process set out in s. 34(2) [*35(2)*] of the HPA.

Therefore, the Council recommends that section 34 [*35*] of the HPA be amended to add a duty to notify a registrant as well as a chance to respond to the allegations prior to action being taken under the section with an exception for cases involving substantial risk to the public in which case action may be taken without notice to the registrant.

3. Both the RNABC and the BCNU object to the requirement found in section 37 [*38*] of the HPA that the complainant in a disciplinary matter may appear as a party. The RNABC states that the complainant is the initiator of the process but the RNABC is the party leading the complaint against the registrant. It further states that giving party status to complainants could lead to abuses and lengthening of the discipline process. The RNABC notes that dissatisfied complainants have a right of appeal if they are not satisfied with the decision of the discipline committee or the penalty imposed. The BCNU agrees with the RNABC on this point. It states that giving the complainant party status, and thus the right to introduce evidence and cross-examine witnesses, would unduly complicate the disciplinary process.

The Council agrees with these submissions. Obviously, the complainant is a crucial part of the discipline process but in the Council's view, the regulatory body is responsible for prosecuting the complaint and a complainant should not be made a "party" to the proceeding. It is important, in the Council's view, that the focus of disciplinary hearing remain professional standards and the public interest, and that the process not become a substitute for personal actions in the courts. Nonetheless, the Council believes that the HPA and the *core principles* indicate the importance of involving the complainant in the process. In particular, the *core principles* state that appropriate rights of appeal should be available to both members and complainants. In the Council's view, the complainant should be given the right to appear at the disciplinary hearing and a right of appeal, but the HPA should be amended to remove the right of the complainant to appear as a "party".

4. The BCNU made submissions regarding the disclosure requirements for disciplinary matters. It states that the NRA should be amended to provide that the RNABC be required to release all information it collects in the course of an investigation, regardless of whether or not it intends to rely on the information at the hearing into a complaint. Currently, Rule 7.12 of the NRA provides that a member whose conduct is being inquired into must be provided with particulars of the conduct being inquired into including proposed exhibits, a list of witnesses expected and summaries of their testimony. Other than section 36(1)(b) which provides that the citation for a discipline hearing must include "particulars" of any evidence in support of the complaint, the issue of disclosure is not dealt with in any detail in the HPA.

In the Council's view, the HPA provisions are inadequate on this issue. Disclosure is a fundamental aspect of a fair disciplinary process, and should be included in the professional statute. While the Council does not agree with the BCNU's submission that all information ought to be disclosed, the Council believes that a registrant ought to be given notice of any evidence sought to be entered at a disciplinary hearing. In the Council's view, rule 7.12 of the NRA is an appropriate model for such a provision.

5. The Council believes that the initial intake process for complaints under the HPA ought to be clarified. Section 36 [*37*] appears to provide that all complaints must be investigated. In its response the RNABC states that it employs an intake person for all complaint matters, and this person is responsible for screening complaints. At this stage many potential complaints are determined to involve matters that are actually beyond the RNABC's mandate. The RNABC notes that in 1995, of 133 specific concerns received, only 30 resulted in formal complaints.

The Council agrees that the HPA should be amended to clearly provide for an initial summary review process by a designated staff person such as the registrar. That person should be empowered to dismiss the complaint where the matter is beyond the mandate of the regulatory body, or where the matter is trivial, frivolous or vexatious. It is only once the matter passes this initial review that the requirement to investigate all complaints should be imposed. However, the Council believes that any summary review process must provide that decisions to dismiss complaints are subject to an internal right of appeal to either the board of the College or the inquiry committee.

6. In considering the requirement for Cabinet approval set out in section 18(5) [*19(5)*] of the HPA, the Council concludes that not all rules should be subject to Cabinet approval. Many matters of professional governance are routine, and in the Council's opinion they should not be subjected to heightened scrutiny; for example, provisions related to financial administration and structure of various committees. The Seaton Commission stopped short of recommending that all rules be approved by government. A useful demarcation between which provisions do and do not require such scrutiny is provided in the Report of the Seaton Commission. In its chapter on professional regulation it stated:

> (a) [that] the major public policy issues [be] addressed in the acts be approved by the Legislature. These would include:
> i. defining the exclusive scope of practice;
> ii. specifying the use of occupational titles;
> iii. establishing codes of ethics;
> iv. determining what constitutes unprofessional conduct and conflict of interest;
> v. permitting appeals to the Supreme Court; and
> vi. defining the duty of confidentiality;
>
> (b) the less substantive issues be addressed in regulations approved by the Cabinet. These would include:
> i. qualification of members to a college board of directors, election procedures and filling of vacancies;
> ii. classes and conditions of membership;
> iii. standards for membership, including educational requirements;
> iv. specialist requirements;
> v. reporting disciplinary decisions;
> vi. professional advertising;
> vii. college records;
> viii. a register of members;

    ix. inspecting a member's practice;
    x. membership reporting requirements;
    xi. exemptions from the regulations;
    xii. the forms required under the Act;
    xiii. details regarding any matter dealt with under the Act; and
    xiv. responsibility for quality assurance and continuing education programs; and

(c) the administrative and internal procedural matters be addressed in college by-laws, be approved by the membership, be filed with the minister of health, and be made available to the public. The minister to have the authority to require that the by-laws be modified. These would include:
    i. adopting a college seal;
    ii. executing documents;
    iii. approval of banking and finance;
    iv. selecting committees and procedures for election to committees;
    v. regulating meetings of the college and its committees;
    vi. appointing officers and the delegation of college powers to those officers;
    vii. prescribing forms for internal use;
    viii. arranging for indemnity insurance;
    ix. regulating membership fees; and
    x. authorizing grants.

Similarly, Ontario's RHPA provides a useful guide in sections 94 and 95 of the Procedural Code to matters which should be subjected to additional scrutiny. Therefore, in the Council's view, section 18 [19] of the HPA should be amended to limit the requirement for Cabinet approval to those matters which raise significant matters of public importance, and in this regard the Seaton Commission's statements and sections 94 and 95 of the Ontario RHPA are an appropriate guideline. The Council would welcome further submissions on this important point.

Another issue related to section 18 [*19*] of the HPA is delay. The RNABC states that it is currently experiencing significant delays in the rule approval process, and expects the problem to be greater were section 18 [*19*] of the HPA to apply. This is particularly so, notes the RNABC, given that section 18(6.1) [*19(7)*] requires distribution of all proposed regulations to all other health professions. The Council generally agrees with this point, and believes it would be contrary to the public interest if this provision were to result in delays in the rule making process.

A possible suggestion regarding the issue of delay is to enact provisions establishing an independent body with the mandate to review rules and bylaws. The review would be independent of both government and the professions, and strict time lines could be imposed. Further, a provision could be enacted stating that rules proposed by regulatory bodies automatically take effect within 90 days of submission, unless the government indicates, in writing, specific objections to the rules.

The Council expects that further improvements to the HPA will come to its attention as it proceeds through the review process for each of the existing professions. The Minister has asked that the Council's final report deal with all professions, and the Council intends to include in the report a comprehensive list of suggested improvements to the HPA.

D. Recommendation

The Health Professions Council recommends to the Minister of Health and Minister Responsible for Seniors that the Nurses (Registered) Act be repealed and the profession of registered nursing be designated under the Health Professions Act.

Appendix: The Terms of Reference and the Criteria and Guidelines.

For the Appendix *Terms of Reference and Guidelines*,
please refer to the Appendix in Part II, Volume 1 – Legislative Review

HEALTH
PROFESSIONS
COUNCIL

OPTOMETRIST'S ACT
LEGISLATIVE REVIEW REPORT
(PRELIMINARY)

May 1996

OPTOMETRY REPORT (PRELIMINARY)

A. Statement of Issues

This is the Health Professions Council's (the HPC) preliminary report of its legislative review of the Optometrist's Act.

The review was conducted pursuant to terms of reference issued by the Minister of Health in accordance with section 24 of the Health Professions Act. The terms of reference directed the HPC to review the governing statutes for each of ten health professions, of which optometry is one.

The terms of reference are included as Appendix A to this report. The purpose of the review as set out in the terms of reference is twofold:

(a) To determine whether designation of the health profession under the Health Professions Act (the HPA) would be in the public interest or whether there are unique features of the health profession, or other relevant factors, that justify a continuing need for a separate statute.

(b) To determine what amendments, if any, are required to the current statute, rules, regulations and bylaws for each profession to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the core principles of professional regulation reflected in the HPA and discussed in Schedule B to the terms of reference.

The general process for the review provides for an initial meeting with the profession, preparation by the Chair of the HPC of a comparative analysis of the profession's current statute with the HPA, discussion of the analysis with the profession, drafting of a preliminary report, discussion of the preliminary report with the HPC, consultation meetings and a final report.

The Council Chair invited representatives of the Board of Examiners in Optometry and the BC Association of Optometrists to meet with him to discuss the review. However both groups declined to meet.

The Council Chair completed his comparative analysis of the Optometrists Act and the HPA. By way of letter dated February 20, 1996 the Board and the Association were provided with a detailed summary of the Chair's analysis of the Optometrists Act, and asked to provide responses to a number of questions posed about the Act and to describe the unique features of optometry, or any other relevant factors, that justify a continuing need for a separate Act. Neither group responded.

Thus, neither the Board nor the Association have participated in the review process despite being provided several opportunities to do so. Accordingly, this report was prepared without their participation.

This report will be circulated to all health professions and other interested parties upon request.

B. Executive Summary

The Health Professions Council has conducted a comparative analysis of the Optometrists Act with the Health Professions Act.

Both the Board of Examiners in Optometry and the BC Association of Optometrists were given an opportunity to respond to the analysis and to make submissions as to why designation under the HPA would not be appropriate for the optometry profession. Neither group chose to respond.

After reviewing the analysis and considering the core principles of professional regulation embodied in the HPA and discussed in the terms of reference, the Council has determined that designation of the profession of optometry under the HPA would be in the public interest, and recommends to the Minister that optometry be so designated.

C. Recommendations

The Health Professions Council recommends to the Minister of Health and Minister Responsible for Seniors that the Optometrists Act be repealed and the profession of optometry be designated under the Health Professions Act.

D. Rationale for Recommendations

As previously noted, the main issues raised by this review are:

(a) To determine whether designation of the profession of optometry under the Health Professions Act (the HPA) would be in the public interest or whether there are unique features of the profession of optometry, or other relevant factors, that justify a continuing need for a separate statute.

(b) To determine what amendments, if any, are required to the current statute, rules, regulations and bylaws for the profession of optometry to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the core principles of professional regulation reflected in the HPA and discussed in Schedule B to the terms of reference.

The Council has determined that it would be in the public interest for the profession of optometry to be designated under the HPA so it will not be necessary to address the second issue. The Council proposes to discuss the first issue by considering first, whether the Optometrists Act contains the core principles of professional regulation reflected in the HPA and discussed in Schedule B to the terms of reference and second, whether there is a need for a separate statute.

WHETHER THE OPTOMETRISTS ACT CONTAINS THE CORE PRINCIPLES OF PROFESSIONAL REGULATION

One of the Council's primary task in conducting this legislative review is to determine whether the professional statute contains the core principles of professional regulation reflected in the HPA and discussed in Schedule B to the terms of reference. To do this, the Council has compared the Optometrists Act (the Act) and the rules and bylaws made pursuant to the Act with the HPA and the model HPA bylaws. After conducting its review of the Optometrists Act, the Council is of the view that it lacks many of the core principles.

Schedule B to the terms of reference organizes the core principles of professional regulation under five headings. The Council proposes to discuss this issue by considering each of those headings in turn.

(a) Mandate of the Regulatory Body

Schedule B of the terms of reference makes two important points under this heading: first, barriers to interdisciplinary practice are not in the public interest, and second, it is important that there be a clear separation between the professional association and the regulatory body.

Both of these points were discussed by the Seaton Commission in its report "Closer to Home". Regarding interdisciplinary practice the Commission stated:

> In addition to broadly stated scopes of practice, there are other barriers to practice. For instance, there is no reason why a member of one profession should not be allowed to be a member of another profession.

> A provision in any regulation, rule, by-law or Code of Ethics which prevents this from happening is inappropriate. It may be in the profession's interest to have such a prohibition, but it is not in the public interest.
>
> Some of the existing professional legislation makes it an offense for a member of a college to work in association with someone who is not a member of that college. But as long as the non-member does not practice within the profession's narrow scope of practice, the commission does not believe there is any substantial reason why a member of a college should not be allowed to work in cooperation or partnership with someone who is not a member. In fact, a multi-disciplinary practice may be beneficial and should be encouraged.

With respect to the relationship between the regulatory body and the professional association, the Commission recommended that two separate bodies be created for all regulated and licensed professions so that there is a clear separation of membership promotion functions and licensing and discipline functions. Without this separation, the Seaton Commission felt that the public protection function of the college would become blurred with the membership promotion function of the professional association.

The Seaton Commission's views echo those of an earlier Report into health care entitled "Health Security for British Columbians, Special Report: Consumer Participation, Regulation of the Professions, and Decentralization" (the Foulkes Report). In a chapter on public regulation and the professions, Professor J.T. McLeod states:

> It is only reasonable to recognize that professions, like other groups and individuals in society, may well be expected to have certain private self-interests of their own which are not coincident with the public interest. Recognition of a degree of real or at least potential conflict between the private interest of the profession and the public interest is the root of the necessary distinction between the professional or licensing body on the one hand, whose purpose is to enforce standards of quality and service, and the voluntary association of the profession on the other hand, whose legitimate function is to advance the particular interests of the profession and its membership. This important distinction between the public function of the licensing body and the private function of the voluntary association is now widely recognized in Canada. From the standpoint of both the professions and the public, it is desirable that the separation of the two functions be kept sharp and distinct.

The Council agrees with these comments, and accepts that barriers to interdisciplinary practice are not in the public interest, and that it is important that there be a clear separation between the professional association and the regulatory body. In the Council's view, the Optometrists Act is deficient on both counts.

First, in the Council's view the Optometrists Act contains several provisions which create barriers to interdisciplinary practice:

> - Rule 41(a) provides that it is a conflict of interest for a member to be associated or affiliated with any person - other than another member, a licensed medical practitioner or regular employees - within the usual premises in which the member practices.
>
> - Rule 41(b) of the Act provides that it is a conflict of interest for a member to be associated or affiliated with any person who supplies optical services or materials.
>
> - Section 20 of the Act appears to provide that an optometrist may only practise optometry in a partnership where all the members are optometrists.

In the Council's view all of these provisions present unnecessary restrictions on members who wish to associate with other health professionals. The Council does not believe there is any reason why an optometrist should not be allowed to work in cooperation or partnership with someone who is not a member as recommended by the Seaton Commission.

Second, several provisions in the Optometrists Act indicate such a close relationship exists between the Board and the Association that there is the potential for conflict between the professional and the public interest:

> - Section 4 of the Act provides that persons registered under the Act are members of the British Columbia Association of Optometrists. In other words, membership in the Association is mandatory and members who do not comply with the Association bylaws, several of which concern matters directed to professional and economic promotion, are not entitled to practice optometry.
>
> - Several provisions in the Act and rules concerning discipline refer to the association. For example, rule 26 provides that members must maintain and uphold the honour and reputation of the association, and refrain from such conduct which appears or tends to bring the association or the profession into disrepute. In addition, section 9.8 of the Act provides that both the board and association may exercise the powers given by the Act

and the rules to enforce the rules made under section 9 regarding optometric corporations. The Council believes it is inappropriate for professional disciplinary powers to be used by a professional association.

- Sections 8(1) to (3) of the Act set out rules for the composition of the board. Bylaws 5.6 to 5.11 provide that the council of the association elects members of the board, and sets out the power of the association's council to remove members of the board. In the Council's view it is not acceptable for the governing body of a profession whose primary function as set by statute is to serve and protect the public to be appointed by a professional association whose interest is primarily that of its membership. The Council believes that the registrants of a college, not the council of a professional association, should be responsible for electing members of the board. In the Council's view, the system under the Act creates a potential for undue influence of the regulatory body's affairs by the professional association.

In addition, there are several provisions in the Optometrists Act which appear to the Council to be more concerned with the economic and professional interests of optometrists than the public interest:

- Rule 37 of the Act sets out rules regarding premises for the practice of optometry, including the requirement for a separate office or suite of offices and a prohibition on offices in retail outlets. The Council has been provided with no information as to why such restrictions are in the public interest.

- Rule 34 of the Act sets out rules regarding advertising including prohibiting the display of licences and diplomas, and of merchandise, ophthalmic materials or promotional materials. In the Council's view, these rules are unduly restrictive and may inhibit optometrists' ability to inform the public about their services.

Further, such restrictions may well violate members' personal rights and freedoms under the Canadian Charter of Rights and Freedoms (see, for example, Rocket v. Royal College of Dental Surgeons (Ontario) [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68, 47 C.R.R. 193, 111 N.R. 161, 40 O.A.C. 241).

In summary, the Council is of the view that the Optometrists Act contains several provisions which create barriers to interdisciplinary practice and which raise the potential for conflict between the economic and professional interests of optometrists and the public interest.

(b) Registration Requirements for Entry into the Profession

Schedule B to the terms of reference makes three important points under this heading. First, natural justice and fairness must be reflected in the admission criteria and application process for newly graduated and foreign trained applicants. Second, there must be objective requirements for registration and accreditation of education programs. Third, applicants should have appropriate rights of appeal affecting registration decisions.

In considering this issue, the Council notes the following deficiencies in the Optometrists Act.

> - Sections 9(1)(a)-(c) of the Act provide that the board may make rules establishing the course of training and education for persons engaging in the study of optometry, providing for a course of instruction in optometry in the province and concerning the examination and admission of applicants to the study and practice of optometry. In the Council's view, it is not appropriate for the profession to exercise such control over the academic qualification process. Although it may be appropriate for the Board to set admission requirements for entry to the profession, and even to have some input on curriculum development, it is not appropriate for the Board to be setting rules regarding the admission of applicants to the study of optometry.
>
> - Rule 15 of the Act provides that applicants for registration must provide evidence of graduation from a school of optometry or university approved by the board. Neither the Act nor the rules set out criteria for approval of schools of optometry and universities. As noted above, one of the core principles of professional regulation is that there must be objective requirements for registration and accreditation of education programs
>
> - The Act does not contain the detailed appeal provisions extended to unsuccessful applicants for registration under the HPA.

In summary, the Council is of the view that the registration process under the Optometrists Act does not reflect adequately the principles set out in the Schedule B of the terms of terms reference.

(c) Quality Assurance Mechanisms

Under this heading, schedule B of the terms of reference states that there should be effective mechanisms for monitoring practitioner competency including the ability to set continuing education requirements, and a committee of the board should be responsible for reviewing standards of practice and codes of ethics.

The Council notes the following deficiencies regarding this principle:

- There is no committee responsible for standards of practice and ethics.

- Section 8.1(2)(f) of the Act provides that the board has the object of establishing a patient relations program to seek to prevent professional misconduct of a sexual nature. Bylaw 17 of the HPA provides that a patient relations program must include measures for dealing with sexual misconduct including educational requirements for registrants, guidelines for the conduct of registrants with their patients, and the provision of information to the public regarding the responsibilities of registrants and the college's complaint and disciplinary process. There is no indication that the Board has established such a program.

(d) Complaint and Disciplinary Process

A review of the HPA and the principles outlined in schedule B to the terms of reference indicates that a designated health profession's complaints and discipline process must, at a minimum, incorporate certain key elements:

(i) the investigative and adjudicative bodies must be made up of different people and the bodies administered independently;

(ii) dissatisfied complainants and registrants must be afforded rights of appeal;

(iii) the process must be consistent with the rules of natural justice, and provide for proper notice of a proceeding and a right to be heard; and

(iv) the process must not be complex: complainants and registrants must understand how the process works.

With this in mind, the Council notes the following deficiencies in the complaints and discipline process provided for in the Optometrists Act:

- Part III of the HPA separates the complaint investigation process (dealt with by the inquiry committee) from the discipline process (dealt with by the discipline committee). Also, bylaw 15(3) of the HPA prohibits members of the discipline committee from hearing matters in which they were involved as part of the inquiry committee. However, under the Optometrists Act, these functions are not separated.

- The definition of professional misconduct in the Act and its rules differs significantly from the definition under the HPA. In particular, rules under the Optometrists Act state that conflict of interest constitutes professional misconduct, and go on to provide a detailed list of presumed conflicts. The list deals with such matters as association with other health care professionals and providers of ophthalmic materials which in the Council's views relate more to the professional and economic interests of the profession than the public interest. The Council believes it is inappropriate for disciplinary rules to be invoked to enforce members' economic and professional interests.

- The Act does not define sexual misconduct.

- Section 31 of the HPA provides that **all** complaints shall be delivered to the registrar who shall deliver them to the inquiry committee along with his or her assessment of the complaint and any recommendations regarding disposition of the complaint. Section 32 of the HPA provides that **all** complaints should be investigated. In contrast, rule 45.2 of the Act provides that the board may return or reject a complaint where the complaint or the statutory declaration does not adequately disclose a violation or the particulars thereof, in the absolute discretion of the board. Rule 45.4 of the Act provides that the board may make investigations but that the board is not bound to conduct any investigation. The Council is concerned about the board's summary disposition powers and in particular the lack of criteria to apply in making such a decision. In addition, the Council is concerned about the lack of an appeal of such a decision, as provided for in the HPA.

- Sections 32(3) and (4) and bylaw 45 of the HPA set out the procedural requirements for the inquiry (investigative) committee including: notifying the parties of the investigation, the general nature of the information that the committee possesses, and the progress of the investigation; hearing from the registrant; and providing the parties with a written decision as soon as possible. **The Optometrists Act contains no similar provisions.**

- Bylaw 44 of the HPA contains provision for mediation of complaints. **The Optometrists Act contains no similar provisions.**

- Section 35 of the HPA provides that the inquiry committee may resolve complaints by way of registrant's undertakings or consents. **The Optometrists Act contains no similar provisions.**

- Section 32(2)(e) of the HPA provides that an inquiry committee may on its own motion investigate a registrant regarding a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs that impairs his or her ability to practice the designated health profession. **The Optometrists Act contains no similar provisions.**

- Bylaw 15(4) of the HPA requires the discipline committee to give reasonable public notice at least 14 days prior to a hearing. **The Optometrists Act contains no similar provisions.**

- Section 37 of the HPA sets out the procedure for a discipline committee hearing including: taking testimony on oath; full rights of cross examination and calling evidence in defence and reply; and the power to order a person to attend a hearing to give evidence and produce records. **The Optometrists Act contains no similar provisions.**

- Bylaw 46 of the HPA provides that the board must keep records of the results of all investigations of the inquiry committee and all decisions of the discipline committee. Bylaw 46 also provides that the board must publish a notice where disciplinary proceedings result in limitation or suspension of a registrant's practice. Bylaws 49(1)(c),(d) and (e) of the HPA provide that the registrar must provide details of restrictions or suspension of a registrants practice upon inquiry. **The Optometrists Act contains no similar provisions.**

- Bylaw 43 of the HPA provides that a registrant must file a report with the registrar if the registrant has reasonable grounds to believe that another registrant has sexually abused a patient, is incompetent, or is suffering from a physical or a mental ailment, emotional disturbance or addiction to drugs or alcohol that may impair his or her ability to practice. **The Optometrists Act contains no similar provision.**

The Council had other concerns about the complaints and discipline process under the Optometrists Act, details of which may be gleaned from the letter sent to the Board and the Association during the course of the review which is attached as Schedule C to this report. The foregoing list simply highlights what appears to the Council to constitute several significant deficiencies in the Optometrists Act process.

(e) Accountability Mechanisms

Schedule B to the terms of reference states under this principle that there should be a requirement for government approval of rules or bylaws. Such a provision is embodied in section 18(5) of the HPA which provides that the minister may request a board to amend or repeal an existing bylaw or make a new bylaw for the college if the minister is satisfied that this is necessary or advisable. Section 18(6) of the HPA provides that where a board does not comply with a request under section 18(5), the Lieutenant Governor in Council may amend or repeal the existing bylaw for the college or make the new bylaw for the college. **The Optometrists Act contains no similar provisions.**

The Council also has concerns about the following issues related to accountability mechanisms:

> - Section 21 of the HPA provides that the register and bylaws of the college shall be open to inspection by any person. **The Optometrists Act contains no similar provision.**
>
> - Bylaw 11(2) of the HPA provides that all board meetings must be open to the public, and bylaw 12(4) provides that all committee meetings must be open to the public. By-laws 11(3) and 12(5) provide that the board or a committee may exclude any person from a meeting or part of a meeting in certain circumstances. **The Optometrists Act contains no similar provisions.**
>
> - Bylaw 42 of the HPA provides for mandatory liability insurance. The Act and its rules are silent on whether members are obliged to maintain professional liability insurance, although section 9.7(2) provides that the board may require a holder of a permit for an optometric corporation to carry insurance for its employees.
>
> - Bylaws 13, 14 and 15 of the HPA provide that at least one member of the registration, discipline and inquiry committees must be a ministerial appointee. **The Optometrists Act contains no similar provisions.**

In summary, the Council is of the view that the Optometrists Act is lacking several important accountability mechanisms contained in the HPA or its bylaws.

Indeed the Council believes that on virtually all of the core principles reflected in the HPA and discussed in the terms of reference, the Optometrists Act is deficient. And on this ground alone, the Council believes that designation under the HPA is in the public interest. However, the Council would like to expand on its conclusion in the following section.

IS THERE A NEED FOR A SEPARATE ACT?

The terms of reference form the framework for the Council's review. Attached as

Schedule A to the terms of reference are criteria and guidelines to which the Council is directed to refer in conducting its review.

On the issue of designation under the HPA, the criteria and guidelines direct the Council to consider the following:

- Where the profession favours designation, and the designation would be in the public interest, the Council may -- following its review of scope of practice -- forego the legislative review and recommend the form of a regulation for designation of the profession under the *Health Professions Act*.
- Where a profession expresses a preference for retention of a statue, the Council should consider these factors:
    - Does the degree of complexity in operating the existing college make it difficult to convert to the regulatory scheme established under the *Health Professions Act*?
    - Is more than one health profession regulated by the same college? If so, would separation of the regulatory responsibilities be desirable because of the difficulties experienced with the existing scheme?
    - Is the current Act so flawed that it need to be repealed and replaced or are only minor amendments required?
    - Is it likely that a new Act for the health profession would closely resemble the *Health Professions Act*?
- A high degree of consistency between statues is essential to reflect the minimum regulatory requirements that apply equally to all health professions.
- It would be desirable to minimize the number of statutes that apply to the governance of health professions in order to facilitate statutory amendments as required from time to time.

The first point is not relevant as there has been no indication from the profession of optometry as to whether they favour designation.

In terms of the second point, the Council does not believe there is a significant degree of complexity in operating the existing college. Further, the issue of more than one health profession being regulated by the same college does not arise. As far as the flaws in the Act, the Council's views regarding the deficiencies in the Optometrists Act are discussed above.

In the Council's view, the latter two points, along with the terms of reference themselves, reflect the Minister's general policy that designation is the preferred option. The Council would like to expand on this important issue.

Under the existing regulatory system, each profession is governed by its own professional statute. There are wide variations in regulatory structures and processes from profession to profession, especially with respect to the complaints and discipline process. This variation and resulting complexity is confusing to the public and registrants. In the Council's view, a uniform regulatory system under the HPA would eliminate much of the complexity and confusion.

Further, several recent reports of Royal Commissions and government policy statements have emphasized that an integrated approach to the delivery of health care is in the public interest. Coordination and cooperation amongst health care providers is of fundamental importance to such an approach. In the Council's view, a uniform regulatory structure enhances the government's ability to apply health care policy in a consistent and coordinated manner.

A general policy favouring designation is consistent with the views of Seaton Commission on Health Care in BC. The following excerpts are from that part of the Commission's report which deals with the regulation of the health professions:

> There is a lack of consistency among the 16 provincial acts that govern the health care professions, despite the fact that all of the colleges established under the acts have the same legislative mandate: to protect the public from preventable harm. Such inconsistency increases the likelihood of variations in judicial interpretations of the acts. Underlying this situation are persistent jurisdictional disputes and a distinct lack of cooperation among the health care professions.
>
> ...
>
> In general, a lack of consistency characterizes the acts with respect to complaints, discipline and appeals, resulting in insufficient public accountability, no uniformity in the structure or organization of the different statutes, and an absence of common terms.
>
> ...

> The Health Professions Act has the potential to influence significantly the future of self regulation of health care professions. Under this new Act, the Health Professions Council can make recommendations to the minister concerning which groups should be granted self-regulation status, their titles, and the extent of their scopes of practice, if any. The Act could be used to create uniform legislative procedures.

These views led the Commission to conclude that the existing health professions acts be repealed and the HPA be revised to serve as the umbrella act for regulating health professions.

The general policy of legislative uniformity is also consistent with initiatives in several other provinces, notably Ontario which has implemented umbrella legislation for the health professions and Alberta which is in the process of enacting umbrella legislation. The Council agrees with these statements about the desirability of uniformity in legislation and believes that, as a general rule, designation under the HPA is the preferred option.

However, the terms of reference and attached criteria and guidelines make it clear that the Council is also to consider whether there are unique features to the profession or other relevant factors that justify a need for a separate Act. In the Council's view, the onus is on the profession to explain what unique features or other relevant factors justify a separate Act. Without such input, the Council cannot assess the need for a separate Act.

In the case of optometry, the Council was hampered by the lack of participation from the Board and Association. The Council received no information from either group in justification of a separate act. Therefore, in light of the lack of information, the many deficiencies in the Optometrists Act, and considering the general policy favouring designation, the Council is not satisfied that a separate act for optometry is justified, and therefore recommends to the Minister that the profession of optometry be designated under the HPA.

Appendices

A. Process document.

B. Terms of reference.

C. Comparative analysis.

For the Appendix *Terms of Reference and Guidelines*,
please refer to the Appendix in Part II, Volume 1 – Legislative Review

HEALTH
PROFESSIONS
COUNCIL

PODIATRISTS ACT
LEGISLATIVE REVIEW REPORT
(PRELIMINARY)

November 1997

PODIATRISTS ACT LEGISLATIVE REVIEW REPORT (PRELIMINARY)

A. Introduction

This is the preliminary report of the legislative review of the Podiatrists Act (the PA) conducted by the Health Professions Council (the Council).

The review was conducted pursuant to the Terms of Reference issued by the Minister of Health and Minister Responsible for Seniors in accordance with section 24 of the Health Professions Act (the HPA). The Terms of Reference direct the Council to review the governing statutes for each of ten health professions, of which podiatry is one.

The Nature of the Review

The purpose of the review as set out in the Terms of Reference is twofold:

(a) To determine whether designation of the health profession under the HPA would be in the public interest or whether there are unique features of the health profession, or other relevant factors, that justify a continuing need for a separate statute.

(b) To determine what amendments, if any, are required to the current statute, rules, regulations and bylaws for each profession to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference.

The Terms of Reference and the Criteria and Guidelines which expand upon them are included as Appendix A to this report.

The Council's primary task in conducting the legislative review is to determine whether it is in the public interest that a health profession be designated under the HPA. The analysis of whether the professional statute contains the *core principles* of professional regulation is an important element in the consideration of whether designation is in the public interest. The extent to which a professional statute currently embodies these *core principles* is clearly one of the factors the Council must consider in making this determination.

However, the core principle analysis is not the only factor that must be considered. The Terms of Reference reflect a general policy that designation under the HPA is the favoured option. They refer to the desirability of minimizing the number of statutes that govern the health professions and the importance of a high degree of consistency among statutes. The Terms of Reference also direct the Council to consider specifically whether there are unique features of a health profession or other relevant factors that justify the need for a separate statute. Thus, the onus is on the profession to establish why a separate statute is in the public interest.

In summary, in determining whether a profession should be designated under the HPA the Council must consider, first, the extent to which the current professional statute embodies the *core principles* of professional regulation and, second, whether there are unique features about the profession or other relevant factors that justify the retention of a separate statute.

The Council would like to clarify at the outset that throughout the legislative review process the Council has received various submissions to the effect that designation under the HPA is tantamount to government "taking over" the professions. That is simply not the case. The HPA still relies on a system of self-regulation. Professions regulated under the HPA still have colleges, and still have a broad rule-making power. Indeed, the basic structure of the HPA is remarkably similar to the current professional statutes. Thus, while there is some difference between provisions of the HPA and the current professional statutes, the HPA clearly embodies a strong commitment to the principle of self-governance.

The Process for the Review

The general process for the review provides for an initial meeting with the profession, preparation by the Chair of the Council of a comparative analysis of the profession's current statute with the HPA, discussion of the analysis with the profession, drafting of a preliminary report, discussion of the preliminary report within the Council, consultation meetings and a final report.

The Council Chair met with representatives of the BC Association of Podiatrists (the Association) and the BC Board of Examiners in Podiatry (the Board) on May 1, 1995 to discuss the review process.

The Chair then completed the comparative analysis of the PA and the HPA, and in a letter dated April 24, 1996 provided the Association and the Board with a detailed summary of the analysis of the PA. The Association and the Board were asked to provide responses to a number of questions and to describe the unique features of podiatry, or any other relevant factors, that justified the retention of a separate statute. The Association and Board provided a joint written submission in response to the questions.

The Chair then completed this preliminary report which will be circulated to all health professions and other interested parties upon request.

B. Executive Summary

The Health Professions Council has conducted a comparative analysis of the PA with the HPA.*

Both the Association and the Board were given an opportunity to respond to the analysis and to make submissions as to why designation under the HPA would not be appropriate for the profession of podiatry. The Board and the Association provided a written submission. In this report the submission will be referred to as the Association's submissions though the Council recognizes that it is a joint effort of the Board and Association.

After reviewing the analysis and considering the *core principles* of professional regulation embodied in the HPA and discussed in the Terms of Reference, the Council has determined that designation of the profession of podiatry under the HPA would be in the public interest. In the Council's view, the general policy favouring designation, the lack of compelling reasons justifying a separate statute, and the deficiencies in the current statute support its recommendation that designation is in the public interest.

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*During the early drafting of this Report statute references were based on RSCB 1979 and Amendments. For ease of reference, the current provisions are indicated in brackets next to the old citations. The currentversions refer to the Health Professions Act, RSBC 1996, Chapter 183, and the Podiatrists Act, RSBC 1996, Chapter 366.

C. Discussion of Issues

As previously noted, the Council's main focus in conducting this review is to determine whether designation of the profession of podiatry under the HPA would be in the public interest, and a key element of this task is to determine whether the PA contains the *core principles* of professional regulation reflected in the HPA and discussed in the Terms of Reference.

The Council has determined that it would be in the public interest for the profession of podiatry to be designated under the HPA and proposes to discuss its conclusion by considering first, whether the PA contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference, and second, whether there is a need for a separate statute.

(1) WHETHER THE PODIATRISTS ACT CONTAINS THE *CORE PRINCIPLES* OF PROFESSIONAL REGULATION

The Council compared the PA and the rules and bylaws made pursuant to the PA with the HPA, and prepared a detailed list of questions which was sent to the Association and the Board. The Association provided detailed responses to all of the questions. The foregoing analysis is the result of the Council's review of the response.

Schedule B to the Terms of Reference organizes the *core principles* of professional regulation under five headings. The Council proposes to discuss this issue by considering each of those headings in turn.

(a) Mandate of the Regulatory Body

Schedule B of the Terms of Reference emphasizes two issues under this heading:

- barriers to interdisciplinary practice are not in the public interest; and

- it is important that there be a clear separation between the professional association and the regulatory body.

Both of these points were discussed by the Seaton Commission in its report "Closer to Home". Regarding interdisciplinary practice the Commission stated:

> "In addition to broadly stated scopes of practice, there are other barriers to practice. For instance, there is no reason why a member of one profession should not be allowed to be a member of another profession. A provision in

> any regulation, rule, by-law or Code of Ethics which prevents this from happening is inappropriate. It may be in the profession's interest to have such a prohibition, but it is not in the public interest.
>
> Some of the existing professional legislation makes it an offence for a member of a college to work in association with someone who is not a member of that college. But as long as the non-member does not practice within the profession's narrow scope of practice, the commission does not believe there is any substantial reason why a member of a college should not be allowed to work in cooperation or partnership with someone who is not a member. In fact, a multi-disciplinary practice may be beneficial and should be encouraged."

With respect to the relationship between the regulatory body and the professional association, the Commission recommended that two separate bodies be created for all regulated and licensed professions so that there is a clear separation of membership promotion functions and licensing and discipline functions. The Seaton Commission felt that without this separation the public protection function of the College would become blurred with the membership promotion function of the professional association.

The Seaton Commission's views echo those of an earlier Report into health care entitled "Health Security for British Columbians, Special Report: Consumer Participation, Regulation of the Professions, and Decentralization" (the Foulkes Report). In a chapter on public regulation and the professions, Professor J.T. McLeod stated:

> "It is only reasonable to recognize that professions, like other groups and individuals in society, may well be expected to have certain private self-interests of their own which are not coincident with the public interest. Recognition of a degree of real or at least potential conflict between the private interest of the profession and the public interest is the root of the necessary distinction between the professional or licensing body on the one hand, whose purpose is to enforce standards of quality and service, and the voluntary association of the profession on the other hand, whose legitimate function is to advance the particular interests of the profession and its membership. This important distinction between the public function of the licensing body and the private function of the voluntary association is now widely recognized in Canada. From the standpoint of both the professions and the public, it is desirable that the separation of the two functions be kept sharp and distinct."

The Council agrees with these comments. Barriers to interdisciplinary practice are not in the public interest, and it is important that there be a clear separation between the professional association and the regulatory body.

In considering the *core principles* which relate to the mandate of the profession, the Council notes the following:

1. The Council believes that the most serious defect in the PA is the significant overlap between powers and duties of the Association and the Board and consequently, the overlap of professional and regulatory functions. The Council notes that under the PA it is the professional association and not the regulatory body which is charged with the duty of serving and protecting the public and exercising its powers and discharging its responsibilities in the public interest. This is despite the fact that Association bylaw 6 provides that the purposes, duties and objects of the Association include advancing the economic welfare of podiatrists. Clearly this is a conflict of interest. In short, the Council is not satisfied that the PA properly distinguishes between the mandate and functions of the Association and the Board.

The Association concedes that there is a lack of clear separation between the Board and the Association. It agrees that the Board's powers must be limited to regulatory matters and the Association's powers to the regulation of the economic, political and professional interests of its members. Indeed its submission is predicated on the assumption that the Board and Association's respective roles will be clarified and that they will have a distinct existence and mandate. However, the Council's mandate is to review the existing legislation governing podiatry. Thus while it is hoped that one of the results of the legislative review process will be a clear separation, this report is based on the legislation as it now stands.

In any event, the Council notes that in its submission, the Association states that "it would not clearly or necessarily be adverse to the public interest for the Association to continue to participate in regulatory matters, with the only limitation being that it not participate in final decision making." The Council disagrees strongly with this statement. In the Council's view it is entirely inappropriate for a professional association to play any role in regulatory matters, particularly in light of Association bylaw 6 which provides that the purposes duties and objects of the Association includes advancing the economic welfare of podiatrists.

With these comments in mind, the Council notes the following provisions which make it apparent that the two bodies share responsibility for regulating the profession:

- the Board is responsible for registration while the Association is responsible for licensure;
- section 3(1)(f) provides that the Board may make rules regarding the discipline of those engaged in the practise of podiatry while Association bylaws 118-123 provide that the Association is responsible for the investigation and discipline process; and

- section 7.8 of the PA provides that the rules under section 3 apply to podiatric corporations and the Association and the Board may exercise the powers given by the PA and its rules to enforce those rules.

Other aspects of the PA further underscore the close relationship between the Board and the Association:

- section 3.1 provides that the Board must submit an annual report respecting the Association;

- bylaw 134(1) provides that the Association executive appoints the podiatrist members of the Board; and

- bylaw 67(r) provides that the Association executive shall perform those duties and functions which the Board may delegate to it from time to time.

As noted, the Association concedes that the regulatory and professional promotion functions should be separated and it does not object to the following concerns raised by the Council regarding the separation of regulatory and membership functions:

(i) The Peer Review Committee (the equivalent of the HPA's inquiry committee) and the Ethics and Grievance Committee (the equivalent of the HPA's discipline committee), both bodies of the Association, would have to be altered such as to fall within the jurisdiction of the Board.

(ii) The administration of the three-layered system of qualification for the practice of podiatry would have to be changed. This refers to the registration, membership and licensure procedures. At present, it is the Board that tackles registration (through the secretary under section 4 of the PA) while the Association handles membership and licensure affairs. If the powers and functions of the Board and Association are clearly delineated, the Board would be tasked to oversee registration and licensure while the Association would logically handle membership requirements.

(iii) The Association offers no objection to the proposed amendment that the Board, and not the Association, should have certain duties and objects enumerated under the PA. This would be in line with other health profession acts such as the Dentists Act and the Medical Practitioners Act which provide for no enumeration of powers and duties of the association or college.

In summary, the Council is very concerned about the lack of a clear separation between the Association and the Board. While it appreciates the Association's concessions regarding this fundamental issue, the Council feels strongly that wholesale changes to the regulatory model are necessary in order that the public interest not be compromised by the overlapping duties and functions of the Board and the Association.

2. The Council is also concerned about section 3(1)(a) [4(1)(a)] of the PA which provides that the Board may make rules establishing the course of training and education for persons engaging in the study of podiatry. In essence this provision grants the Board the power to approve of schools or programs in the practice of podiatry.

The Association argues that this provision is in the public interest since it is the body most competent to determine satisfactory standards in the training or instruction in podiatry.

The Council accepts that the Board is clearly knowledgable in matters related to podiatry and that a regulatory body clearly has the duty to ensure that entrants to practice are properly qualified. Indeed this duty is captured within section 3(1)(a) of the PA which provides that the Board may make rules regarding admission to registration as a podiatrist. However, in the Council's view this duty should not extend to making rules in regard to programs of instruction in podiatry. Although the regulatory body is knowledgeable about podiatry and can be a valuable resource in designing educational programs, giving it the power to approve of schools in podiatry is more than the public interest in quality assurance requires. In short, while it may be appropriate for the College to set admission requirements for entry to the profession and to have input on curriculum development, in the Council's view it is not appropriate for the Board to have the power to approve schools in the practice of podiatry.

3. The Council notes that the Association offers no objections to several issues raised by the Council regarding the Mandate of the Regulatory Body. In particular, the Association agrees with the following points:

- The PA should be amended so as to include section 18(1)(r) [19(1)(t)] of the HPA which sets out the mandatory establishment of a registration committee, a quality assurance committee, an inquiry committee, a discipline committee, a patient relations committee, and other committees the board deems necessary or advisable.

- The PA should be amended to include section 51 [52] of the HPA which gives a board the power to apply to the Supreme Court for an interim or permanent injunction to restrain a person from contravening the Act, the regulations or its bylaws. The Council notes that the Association sees the need for this provision only with regard to unregistered practitioners, as it claims that there exist sufficient remedies regarding registered practitioners.

- Section 23 [24] of the HPA should be incorporated into the PA. This section deals with immunity for acts or omissions in good faith of the board and members acting on behalf or under the direction of the board or college.

(b) Registration Requirements for Entry into the Profession

Schedule B to the Terms of Reference makes three important points under this heading. First, natural justice and fairness must be reflected in the admission criteria and application process for newly graduated and foreign trained applicants. Second, there must be objective requirements for registration and accreditation of education programs. Third, applicants should have appropriate rights of appeal affecting registration decisions. In considering the core principles regarding registration requirements, the Council notes the following:

1. The PA sets out a three step process for registration as a podiatrist: registration with the Board, and membership and licensure through the Association. The Council sought elaboration on these three levels. In its response the Association states that the three-tiered approach ensures clarity, consistency and accountability in the granting of the right to practice podiatry. It notes that registration by the Board deals with competence to practice issues while membership in the association, which includes a requirement for mandatory liability insurance, ensures the continued viability of the Association. The Council notes that the Association concedes that once membership and regulatory functions are clearly separated and allocated within the Association and the Board, the latter would be tasked to oversee registration and licensure while the former would handle membership requirements. In the Council's view, for the reasons outlined under Mandate of the Regulatory Body, it is not appropriate for the Association to play any role in registration. While the Council has no objection in principle to mandatory membership in the Association or the requirement for mandatory liability insurance, these matters can easily be dealt with by the Board through its rule making powers in relation to registration. In short, there is no reason for Association involvement in the registration process.

2. The Council requested clarification from the Association regarding the registration criteria set out in the PA. Section 4(1) [6(1)] of the PA requires that registrants be of "good moral character".

The Association submits that the provision is in the public interest as it ensures that only persons of good moral character are registered. The Council's concern about this provision was that it may violate one of the *core principles* discussed under registration requirements - namely that requirements for registration must be objective. The difficulty with the term "good moral character" is that it injects a significant degree of discretion into the decision making process. Nonetheless, after considering the submission of the Association, the Council recognizes the need for such a provision and is satisfied that it does not violate the *core principles* of professional regulation. Indeed, the Council takes note of the fact that the notion of "good moral character" is well established in many other professional regulatory statutes. Of course, it is essential that the discretionary power afforded the Association through the use of such a term be exercised with utmost consistency and fairness.

3. Finally, the Association agrees with several issues raised by the Council regarding the core principles related to registration requirements:

(i) A registration committee should be established in lieu of the existing scheme in the PA where the secretary of the Board is in charge of registration. The registration committee would be the sole body to deal with applications for registration

(ii) The PA should include section 19(3) [20(4)] of the HPA which gives a person whose application for registration as a member is refused an appeal to the Supreme Court.

(c) Quality Assurance Mechanisms

Under this heading, schedule B of the Terms of Reference states that there should be effective mechanisms for monitoring practitioner competency including the ability to set continuing education requirements, and a committee of the board should be responsible for reviewing standards of practice and a codes of ethics.

In the Council's view the core principles regarding quality assurance mechanisms are largely satisfied for the profession of podiatry. However, the Council again notes that the Association is heavily involved in this area. The Association presently manages these functions through several of its existing bodies. In the Council's view, these matters are more properly addressed by the regulatory body. A single committee of the Board should be responsible for the *core* principle of reviewing the standards of practise and code of ethics and circulating new practise guidelines and bulletins to members.

(d) Complaint and Disciplinary Process

A review of the HPA and the principles outlined in schedule B to the Terms of Reference indicates that a designated health profession's complaints and discipline process must, at a minimum, incorporate certain key elements:

- the investigative and adjudicative bodies must be made up of different people and the bodies administered independently;

- dissatisfied complainants and registrants must be afforded rights of appeal;
- the process must be consistent with the rules of natural justice, and provide for proper notice of a proceeding and a right to be heard; and
- the process must not be complex: complainants and registrants must understand how the process works.

With this in mind, the Council notes the following regarding the complaints and disciplinary process under the PA:

1. At the outset of this report, the Council expressed its concern about the overlapping roles of the Association and the Board. Nowhere is this overlap more apparent than in the complaints and discipline process. Section 9(1) of the PA provides that a certificate issued by the Board may be revoked by the Board for a violation of the law, incompetency, inebriety, fraud or misrepresentation or unprofessional conduct. Section 3(1)(c) of the PA provides that the Board may make rules establishing the procedure on the hearing of a complaint; however, the PA rules contain no provisions regarding disciplinary hearings. Rather, the Association bylaws provide that the Association and various committees established by the Association are responsible for the disciplinary process.

The Association confirms that its Peer Review Committee handles the investigative aspects, while the Ethics and Grievance Committee of the Association and the Board oversee the adjudicative tasks in the complaint and disciplinary process. The Association concedes that the overlap of roles is not appropriate and throughout its response regarding complaints and discipline states that there should be a clear separation of regulatory and membership functions. Further, the Association appears to accept that the complaints and discipline process in the HPA would be appropriate for the profession of podiatry as it notes that the processes under the PA were designed as much as possible to follow the model of the HPA. The Association also notes that many elements of the HPA already exist under the PA.

The Association underscores this point in its submission as it agrees with most of the Council's analysis regarding the complaints and discipline process. In particular the Association agrees with following:

(i) It offers no objection to including in the PA a provision similar to section 36 [37(2)] of the HPA requiring thirty-days notice of a disciplinary hearing.

(ii) It agrees that section 4(6) [7(1)] of the PA should provide for an appeal procedure such as the one found in section 39 [40] of the HPA. In fact, it also agrees that the current regulatory regime of the PA can be amended to incorporate Part III of the HPA which sets out the rules for dealing with complaints.

(iii) It agrees that the PA should include a provision such as section 25 [26] of the HPA which gives the regulatory body jurisdiction over former registrants regarding complaint and disciplinary matters.

(iv) It agrees with the inclusion of provisions similar to section 32(4) [33(6)(a)] of the HPA which provides that the inquiry committee may take no further action because the matter is trivial, frivolous or vexatious or made in bad faith or relates to conduct or competence that is found to be satisfactory.

(v) It agrees with section 33(2) [34(2)] of the HPA to accord complainants the right to appeal a decision to not proceed with a hearing and dismiss a matter outright.

(vi) It agrees that section 35 [36] of the HPA which provides that the inquiry committee may resolve complaints by way of registrants' undertakings or consents.

(vii) It consents to section 36 [37] of the HPA which sets out clear requirements regarding the contents of disciplinary hearing notices or citations.

(viii) Other proposed changes to the PA by the Council includes the procedure for a discipline committee hearing outlined in section 37 [38] of the HPA.

(ix) The Association agrees with the mandate under section 38(2) [39(2)] of the HPA that an order of the discipline committee must be in writing.

(x) It agrees with the provision for an appeal route similar to section 39 [40] of the HPA, making it an offence for a registrant to violate his or her terms of registration and to obstruct an inspector in the lawful performance of his or her duties.

(xi) Finally, it agrees with the prohibition of a prosecution of offences after two years.

In short, the Association accepts, for the most part, that the complaints and disciplinary process set out under the HPA would be appropriate for the regulation of podiatry. Indeed, in response to the Council's question "what objection would you have to including the HPA complaints and disciplinary process in the PA?", the Association stated that there is no objection to amending the PA to set out the actual, desirable disciplinary structure, provided that such amendments recognize that the podiatry profession has limited resources.

(e) Accountability Mechanisms

Schedule B to the Terms of Reference states under this heading that there should be a requirement for government approval of rules or bylaws. Such a provision is embodied in section 18(5) [19(5)] of the HPA which provides that the Minister may request a board to amend or repeal an existing bylaw or make a new bylaw for the college if the Minister is satisfied that this is necessary or advisable. Section 18(6) [19(6)] of the HPA provides that where a board does not comply with a request under section 18(5) [19(5)], the Lieutenant Governor in Council may amend or repeal the existing bylaw for the College or make the new bylaw for the College.

The Association objects strongly to such Ministerial power when it comes to matters involving professional knowledge, skills or understanding. In the Association's view, the public interest is best served only if effective input from the profession through the Board and the Association is assured as they are the bodies with expertise in podiatry. The Association also believes that the HPA process would be more cumbersome and time consuming.

As the Council has already noted, the Minister has indicated that the terms of reference embody the core principles of professional regulation, and this provision must be considered one of them. The Council believes that this provision underscores the principle that self regulation is a privilege and not a right. Further, the other parts of section 18 of the HPA embody the current bylaw approval process, and the Council expects that in most cases the existing process will be followed. Resort to the power set out in section 18(6) will likely only occur in the rarest of cases.

Also under this heading, the Association agrees with the Council that there should be an express requirement for the Board to maintain a register of those persons who are registered as podiatrists in B.C.

(f) The HPA Bylaws

The Terms of Reference directed the Council to conduct a comparative analysis of the HPA with each professional statute, along with any relevant rules, regulations or bylaws, in order to ensure that they contain the *core principles* of professional regulation. The Terms of Reference also indicated that the HPA embodies those *core principles* of professional regulation which the Minister considers are desirable or essential for regulating the profession in the public interest.

In the initial phase of the review process, the Council also considered the HPA draft bylaws. These bylaws are distributed to newly designated professions as a guide for drafting bylaws for their new regulatory colleges. Several questions in the Council's comparative analysis referred to the draft bylaws. The Council informed the professions that although the bylaws were not legally binding, they reflected the Ministry's view of provisions which were desirable for regulating a profession in the public interest.

During the review process, the original draft bylaws were substantially rewritten, and many provisions were removed and some added. This complicated the Council's process as its initial questions referred to the original draft of the bylaws. The revisions also underscored the fact that the bylaws were not legally binding, and subject to modification, making it somewhat difficult to assess which bylaw provisions embody *core principles* of professional regulation.

Nonetheless, many provisions appear in both versions of the draft bylaws, and are also consistent with the *core principles* discussed in the Terms of Reference. The Council felt it important to note where provisions in the PA could be considered inadequate, incomplete or missing having regard to the draft bylaws. The Council has decided to include its account of such provisions in this separate section in order to reflect the fact that the bylaws have a different legal status than the HPA. In its review of the PA, the Council notes the following concerns:

1. The Association agrees that the PA must contain a provision such as bylaw 39(5)(b) [54(3)] of the HPA which permits an applicant three opportunities to pass the Board's entry level examinations. The Association mentions that despite the absence of such provision, this provision accords with the actual practise of the Board.

2. The Association understands the need for a provision similar to bylaw 39(2) [57] of the HPA which provides that a registrant who has not practised for five years must successfully complete the examination required by the Board prior to receiving his or her renewal of registration.

3. Generally, the Association offers no objection to the principle of openness of Board or Association meetings. It expresses concern about telephone conferences, and the meetings of some committees such as the Education Committee and the Legislative and Government Affairs Committee whose subject matters are not necessarily pertinent to public dissemination. The Council believes that meetings of the various committees of the Association and the Board should generally be open to the public, subject to a discretion to exclude the public in certain circumstances. This is embodied in bylaws 13, 14 and 15 [14(2), 15(2) and 16(2)] of the HPA. To the extent that other research committees may be established, the Council believes that their meetings need not necessarily be open to the public.

(g) General Conclusions from Comparative Analysis

After a careful review of the PA and the PA bylaws, the Council is of the view that the legislation regarding the profession of podiatry is for the most part deficient having regard to the *core principles* of professional regulation embodied in the HPA and discussed in the Terms of Reference.

The Council's greatest concern is with the lack of a clear separation between the Association and the Board of Examiners. This overlap of functions manifests itself throughout the regulatory scheme for podiatry, most notably in relation to the complaints and discipline and registration processes. As noted, the Association concedes that this overlap is inappropriate; however, it still asserts that the Association has some role to play in regulatory matters. The Council disagrees strongly with this notion, and believes that there is no place for a professional association in the regulation of a profession.

(2) WHETHER THERE IS A NEED FOR A SEPARATE ACT

The Council proposes to address this issue by discussing the general policy favouring designation and the profession specific arguments regarding designation.

The general policy favouring designation

As stated in the introduction to this report, the Terms of Reference reflect a general policy that designation is the favoured option, and that a profession must justify a continuing need for a separate statute. The Council would like to expand on this important issue.

Under the existing regulatory system, each profession is governed by its own professional statute. The terminology used as well as the regulatory structures and processes created vary widely from profession to profession, especially with respect to the complaints and discipline process. This variation and resulting complexity is confusing to the public and registrants. In the Council's view, a uniform regulatory system under the HPA would eliminate much of the complexity and confusion, and foster the development of a common jurisprudence for the health professions.

Several recent reports of Royal Commissions and government policy statements have emphasized that an integrated approach to the delivery of health care is in the public interest. Coordination and cooperation amongst health care providers is of fundamental importance to such an approach, and in the Council's view, a uniform regulatory structure enhances the government's ability to apply health care policy consistently.

One policy initiative for which coordination and consistency is particularly relevant is the scope of practice review process the Council is currently conducting. The Ministry has requested that the Council review the scopes of practice of the existing professions with a view to implementing a new regulatory framework for health professions in British Columbia. The key elements of the new framework are broad, non-exclusive scope of practice statements and narrowly defined reserved acts. Reserved acts are those elements of a profession's scope of practice which present such a significant risk of harm that they should be reserved to a particular profession that is qualified to perform them. The new system will create overlapping scopes of practice, and it is likely that many of the reserved acts will be shared amongst particular professions. In the Council's view, a uniform regulatory structure would ease the implementation of the new model of professional regulation.

A general policy favouring a uniform regulatory structure was referred to in the report of the Seaton Commission on Health Care in BC. The following excerpts are from that part of the Commission's report which deals with regulation of the health professions:

> "There is a lack of consistency among the 16 provincial acts that govern the health care professions, despite the fact that all of the colleges established under the acts have the same legislative mandate: to protect the public from preventable harm. Such inconsistency increases the likelihood of variations in judicial interpretations of the acts. Underlying this situation are persistent jurisdictional disputes and a distinct lack of cooperation among the health care professions.
>
> ...
>
> In general, a lack of consistency characterizes the acts with respect to complaints, discipline and appeals, resulting in insufficient public accountability, no uniformity in the structure or organization of the different statutes, and an absence of common terms.
>
> ...
>
> The Health Professions Act has the potential to influence significantly the future of self regulation of health care professions. Under this new Act, the Health Professions Council can make recommendations to the minister concerning which groups should be granted self-regulation status, their titles, and the extent of their scopes of practice, if any. The Act could be used to create uniform legislative procedures."

These views led the Commission to conclude that the existing health professions acts be repealed and the HPA be revised to serve as the umbrella act for regulating health professions.

The general policy of legislative uniformity is also consistent with initiatives in several other provinces, notably Ontario which has implemented umbrella legislation for the health professions and Alberta which is in the process of enacting umbrella legislation.

The Council agrees with these statements about the desirability of uniformity in legislation and accepts that, as a general rule, designation under the HPA is the preferred option. This general policy favouring designation is embodied in the Terms of Reference which refer to the desirability of a "high degree of consistency between statutes" and of "minimiz[ing] the number of statutes that apply to the governance of health professions". Indeed, the Terms of Reference and attached criteria and guidelines make it clear that the Council is to consider whether there are unique features of the profession or other relevant factors that justify a need for a separate statute.

The profession specific arguments regarding designation

The Association does not support designation under the HPA. It states that the HPA takes a task approach to regulating scopes of practice which is impractical in regard to health professions such as podiatry and general medicine. These professions, the Association contends, involve a medical level of training leading to a practice which is simply not reducible or amenable to the HPA approach.

In the Council's view, the Association's submission is based on a misunderstanding of the HPA approach to regulating scopes of practice. Under the HPA, each profession's scope of practice statement is contained in a regulation to the HPA. Unlike the present scheme governing the established professions the statement does not set out an exclusive scope of practice, but simply describes the services provided by members of the professions.

The reference in the HPA to lists of services which may only be performed by members of a particular profession applies only to services which, because of the risk of harm associated with them, should only be performed by members of the particular profession. In other words, contrary to the Association's submission, the HPA does not require that each and every task performed by a profession be listed in a regulation.

In any event, the Council does not agree with the thrust of the Association's submission on this point which is that the HPA is intended to apply only to smaller, task oriented professions. The Terms of Reference clearly indicate that the government is contemplating uniform legislation for the health professions, and has directed the Council to use the HPA as its template for assessing the quality of the existing professional statutes. While the initial intention may have been that the HPA would provide a legislative framework for new and emerging professions, that intention has clearly changed. Further, the Seaton Commission recommended that a revised HPA serve as an umbrella statute for all existing health professions.

Finally, on the general issue of designation under the HPA, the Council notes that the Association concedes that with regard to general regulatory matters the HPA provides for an efficient, effective procedural framework which could apply to podiatry.

In summary, in the Council's view the Association has not presented any significant reasons which justify the continuing need for a separate statute.

(3) THE COUNCIL'S CONCLUSION REGARDING DESIGNATION

As noted in the introduction to this report, in determining whether a profession should be designated under the HPA the Council must balance the extent to which the present professional statute embodies the *core principles* of professional regulation and whether there are unique features about the profession or other relevant factors that justify the continuing need for a separate statute.

In considering this matter, the Council believes that the legislation regarding podiatry is for the most part deficient having regard to the *core principles* of professional regulation. This, combined with the general policy favouring designation and the lack of persuasive reasons supporting a separate statute, lead the Council to conclude that designation of podiatry under the HPA is in the public interest.

In the Council's view, its conclusion is supported by the tenor of the Association's response. Throughout its response the Association has indicted its substantial agreement with the provisions of the HPA. Indeed, in several places it has stated that the PA is modeled on the HPA system. After reviewing the area of agreement the Council is of the view that were theses changes to be incorporated into a new PA the result would be a statute containing all the necessary elements of the HPA except that the title of "Podiatrists Act" is maintained.

In summary, in the Council's view, the public interest would best be served were the profession of podiatry to be designated as a health profession under the HPA.

D. Recommendation

The Health Professions Council recommends to the Minister of Health and Minister Responsible for Seniors that the Podiatrists Act be repealed and the profession of podiatry be designated under the Health Professions Act.

Appendices

Appendix A: The Terms of Reference and the Criteria and Guidelines.

For the Appendix *Terms of Reference and Guidelines*,
please refer to the Appendix in Part II, Volume 1 – Legislative Review

HEALTH
PROFESSIONS
COUNCIL

PSYCHOLOGISTS ACT
LEGISLATIVE REVIEW REPORT (PRELIMINARY)

July 1998

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FOREWORD

This report is the result of the Health Professions Council's legislative review of the Psychologists Act pursuant to the Terms of Reference from the Minister of Health and Minister Responsible for Seniors. Under the Health Professions Act, the Health Professions Council is a six person advisory body appointed by the Government of British Columbia to make recommendations to the Minister of Health and Minister Responsible for Seniors about the regulation of health professions.

In this report the Health Professions Council examines two issues:

(1) whether designation of the health profession of psychology under the Health Professions Act would be in the public interest or whether there are unique features of the health profession, or other relevant factors, that justify a continuing need for a separate statute; and

(2) what amendments, if any, are required to the current statute, rules, regulations and bylaws for the profession of psychology to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the Health Professions Act and discussed in Schedule B to the Terms of Reference.

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EXECUTIVE SUMMARY

The Health Professions Council has conducted a comparative analysis of the Psychologists Act with the Health Professions Act.

After reviewing the analysis and considering the *core principles* of professional regulation embodied in the Health Professions Act and discussed in the Terms of Reference, the Health Professions Council has determined that designation of the profession of psychology under the Health Professions Act would be in the public interest. In the Health Professions Council's view, the general policy favouring designation and the lack of compelling reasons justifying a separate statute, and the deficiencies in the current Psychologists Act support its recommendation that designation is in the public interest.

PSYCHOLOGISTS ACT LEGISLATIVE REVIEW REPORT (PRELIMINARY)

I. INTRODUCTION

This is the preliminary report of the legislative review of the Psychologists Act (the PA) conducted by the Health Professions Council (the Council).

The review was conducted pursuant to the Terms of Reference issued by the Minister of Health and Minister Responsible for Seniors in accordance with section 24, now section 25, of the Health Professions Act (the HPA).[1]

The Terms of Reference direct the Council to review the governing statutes for each of ten health professions, of which psychology is one.

A. THE NATURE OF THE REVIEW

The purpose of the review as set out in the Terms of Reference is twofold:

(a) To determine whether designation of the health profession under the HPA would be in the public interest or whether there are unique features of the health profession, or other relevant factors, that justify a continuing need for a separate statute.

(b) To determine what amendments, if any, are required to the current statute, rules, regulations and bylaws for each profession to provide adequately for the regulation of the profession in the public interest and to ensure that the current statute contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference.

The Terms of Reference and the Criteria and Guidelines which expand upon them are included as an Appendix to this report.

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[1] During the early drafting of this Report statute references were based on RSBC 1979 and Amendments. For ease of reference, the old provisions are indicated in brackets next to the current citations. The current versions refer to the Health Professions Act, RSBC 1996, Chapter 183, and the Psychologists Act, RSBC 1996, Chapter 381.

The Council's primary task in conducting the legislative review is to determine whether it is in the public interest that a health profession be designated under the HPA. The analysis of whether the professional statute contains the *core principles* of professional regulation is an important element in the consideration of whether designation is in the public interest. The extent to which a professional statute currently embodies these *core principles* is clearly one of the factors the Council must consider in making this determination.

However, the *core principle* analysis is not the only factor that must be considered. The Terms of Reference reflect a general policy that designation under the HPA is the favoured option. They refer to the desirability of minimizing the number of statutes that govern the health professions and the importance of a high degree of consistency among statutes. The Terms of Reference also direct the Council to consider specifically whether there are unique features of the health profession or other relevant factors that **justify** a separate statute. Thus, the onus is on the profession to establish why a separate statute is in the public interest.

In summary, in determining whether a profession should be designated under the HPA the Council must consider, first, the extent to which the current professional statute embodies the *core principles* of professional regulation and, second, whether there are unique features of the profession or other relevant factors that justify the retention of a separate statute.

The Council would like to clarify at the outset that throughout the legislative review process it has received various submissions to the effect that designation under the HPA is tantamount to government "taking over" the professions. That is simply not the case. The HPA still relies on a system of self-regulation. Professions regulated under the HPA still have colleges, and still have a broad rule-making power. Indeed, the basic structure of the HPA is remarkably similar to the current professional statutes. Thus, while there is some difference between provisions of the HPA and the current professional statutes, the HPA clearly embodies a strong commitment to the principle of self-regulation.

B. THE PROCESS FOR THE REVIEW

The general process for the review provides for an initial meeting with the profession, preparation by the Chair of the Council of a comparative analysis of the profession's current statute with the HPA, consultation with the profession regarding the analysis, drafting of a preliminary report, discussion of the preliminary report within the Council, consultation meetings and a final report.

The Council Chair met with representatives of the regulatory body, the College of Psychologists of British Columbia (the CPBC) and the professional association, the British Columbia Psychological Association (the BCPA), on April 3, 1995, to discuss the review process.

The Chair then completed the comparative analysis of the PA and the HPA, and provided the CPBC and the BCPA with a detailed summary of the analysis of the PA. The CPBC and the BCPA were asked to provide responses to a number of questions and to describe the unique features of the psychology profession, or any other relevant factors, that justified the retention of a separate statute. The CPBC responded to all of the questions while the BCPA answered only the general question regarding designation of psychology under the HPA. In addition, the CPBC provided a submission setting out specific objections to various provisions in the HPA.

The Chair then completed this preliminary report which will be circulated to all health professions and other interested parties upon request.

C. THE PSYCHOLOGISTS ACT

The first provincial enactment for psychology was the Psychologists Act, SBC 1977, c.19. The practice of psychology and "registered psychologist" was defined and the use of reserved titles was enunciated. It also provided for the continuance of the B.C. Psychological Association and constituted a board of directors with the power to make rules and regulations. The board was also given preliminary injunctive powers while the Association was granted by-law making power with respect to registration, the adoption of a code of ethics and membership in the Association.

Several amendments have been made to the statute, notably in 1987, when exemption from the Act was expanded to further exempt persons acting in the course of employment by a board of school trustees constituted under the School Act. Also, university psychology teachers and lecturers and government employees in positions where psychology is a condition of employment were now allowed to use the title "psychologist". Most recently in 1993, pursuant to the Health Professions Statutes Amendment Act, 1993, c.50, amendments were made to include the present duties and objects clause, enhanced inspection powers, and interim suspension powers in professional disciplinary matters.

II. DISCUSSION OF ISSUES

The Council's primary focus in conducting this review is to determine whether designation of the profession of psychology under the HPA would be in the public interest, and a key element of this task is to determine whether the PA contains the *core principles* of professional regulation reflected in the HPA and discussed in the Terms of Reference.

The Council has determined that it would be in the public interest for the profession of psychology to be designated under the HPA and proposes to discuss its conclusion by considering first, whether the PA contains the *core principles* of professional regulation reflected in the HPA and discussed in Schedule B to the Terms of Reference, and second, whether there is a need for a separate statute. The Council also intends to make some recommendations regarding possible improvements to the HPA.

A. DOES THE PSYCHOLOGISTS ACT CONTAIN THE *CORE PRINCIPLES* OF PROFESSIONAL REGULATION?

Schedule B to the Terms of Reference organizes the *core principles* of professional regulation under five headings. The Council proposes to discuss this issue by considering each of those headings in turn.

At the outset, the Council notes that in response to the Council's preliminary analysis, the CPBC appears to recognize that there are deficiencies in the current PA. The CPBC has provided the Minister of Health with a list of proposed changes to the PA, and has asked that they be implemented. However, the Minister has indicated that as the PA is under review by the Council, it would be inappropriate to make changes to the PA.

The Council wishes to emphasize that its analysis is based on the current PA, rules and bylaws. The Council also notes that the CPBC has indicated that "*much of the HPA could be directly applied to the profession of psychology*", and "*the college would not object to most of the sections set out in the HPA*". Thus, the CPBC appears to support, generally, the HPA structure and processes, though it does raise specific concerns about some of its provisions. The CPBC nevertheless responded to the issues raised by the Council in its preliminary analysis.

1. Mandate of the Regulatory Body

Schedule B of the Terms of Reference makes two important points under this heading:

i. barriers to interdisciplinary practice are not in the public interest; and

ii. it is important that there be a clear separation between the professional association and the regulatory body.

Both of these points were discussed by the Seaton Commission in its report "Closer to Home". Regarding interdisciplinary practice the Commission stated:

> *In addition to broadly stated scopes of practice, there are other barriers to practice. For instance, there is no reason why a member of one profession should not be allowed to be a member of another profession. A provision in any regulation, rule, by-law or Code of Ethics which prevents this from happening is inappropriate. It may be in the profession's interest to have such a prohibition, but it is not in the public interest.*
>
> *Some of the existing professional legislation makes it an offence for a member of a college to work in association with someone who is not a member of that college. But as long as the non-member does not practice within the profession's narrow scope of practice, the commission does not believe there is any substantial reason why a member of a college should not be allowed to work in cooperation or partnership with someone who is not a member. In fact, a multi-disciplinary practice may be beneficial and should be encouraged.*

The Council agrees with these comments about interdisciplinary practice.

With respect to the relationship between the regulatory body and the professional association, the Commission recommended that two separate bodies be created for all regulated and licensed professions so that there is a clear separation of membership promotion functions and licensing and discipline functions. Without this separation, the Seaton Commission felt that the public protection function of the regulatory college would become blurred with the membership promotion function of the professional association.

The Seaton Commission's views echo those of an earlier report into health care entitled "Health Security for British Columbians, Special Report: Consumer Participation, Regulation of the Professions, and Decentralization" (the Foulkes Report). In a chapter on public regulation and the professions, Professor J.T. McLeod stated:

> *It is only reasonable to recognize that professions, like other groups and individuals in society, may well be expected to have certain private self-interests of their own which are not coincident with the public interest. Recognition of a degree of real or at least potential conflict between the private interest of the profession and the public interest is the root of the necessary distinction between the professional or licensing body on the one hand, whose purpose is to enforce standards of quality and service, and the voluntary association of the profession on the other hand, whose legitimate function is to advance the particular interests of the profession and its membership. This important distinction between the public function of the licensing body and the private function of the voluntary association is now widely recognized in Canada. From the standpoint of both the professions and the public, it is desirable that the separation of the two functions be kept sharp and distinct.*

The Council agrees with these comments and believes that it is important that there be a clear separation between the professional association and the regulatory body.

With these comments in mind, the Council notes the following:

1. The Council is concerned about Rules 9.9 and 9.10 of the PA, which provide:

> *9.9 The College may affiliate with other professional associations, provided that those organizations do not have goals that are contrary to the Act, and that membership in these organizations does not compromise the goals of the College.*
>
> *9.10 With respect to its affiliation with the American Psychological Association (A.P.A.) the acts and omissions of the College are not to be imputed to the A.P.A. unless explicitly permitted by the A.P.A. The College agrees to indemnify the A.P.A. as a direct result of the acts and omissions of the College related in any way to the regulatory functions of the College.*

One of the *core principles* of the legislative review is that activities of a regulatory body to promote the economic, political and professional interests of its members must not compromise the ability of the regulatory body to regulate the profession in the public interest. The Council fears that these provisions, particularly section 9.10, create the potential for a violation of this *core principle*, and are not appropriately included in a professional statute. The CPBC has no objection to removing these rules.

2. The Council asked the CPBC about section 19(1)(t) [*18(1)(r)*] of the HPA which provides that a board **may** establish a number of specific committees and asked the CPBC whether it has established any committees other than a professional standards committee and a membership committee. The CPBC's position is set out in its "Critique of the Health Professions Act", dated July 1995 which was submitted for the Council's review of the scope of practice of psychology. It states:

> *Finally, we noticed in the model bylaws that there will be a large number of required committees. This will be quite problematic for some of the currently unregulated health professional groups (e.g., Marriage and Family Therapists). The College of Psychologists finds that its current committee and board structure is difficult to maintain with available resources. The College of Psychologists has nine hundred members. Maximally, we obtain committee contributions and other volunteer services from five percent of our membership. We frequently have empty spots on committees, committee and board members frequently resign secondary to burnout, and our board positions are frequently filled by acclamation because we do not have enough nominees to hold an election. If the College of Psychologists, with a membership of nine hundred, has these difficulties with fewer committees than stipulated in the Health Professions Act model bylaws, how feasible will a larger committee structure be in organisations between one and five hundred members?*

The HPA requires, as a minimum, the establishment of an inquiry, a disciplinary and a registration committee. The establishment of all other committees enumerated in s. 19(1)(t) [*18(1)(r)*] of the HPA are merely discretionary. Further, the CPBC, in its response to the Council's preliminary analysis of the PA, no longer objects to this HPA provision as the CPBC contends that its current structure and the CPBC's proposed changes to its bylaws have included the additional committees.

3. The CPBC offers no objection to including in the PA Part 4 of the HPA which sets out provisions for the regulation of health profession corporations.

4. Finally, the Council notes that the PA does not contain a provision such as section 18(1) [*17(1)*] of the HPA which states that,

> *A board shall govern, control and administer the affairs of its college in accordance with this Act, the regulations and the bylaws.*

In the Council's view, a professional statute should contain such a section.

2. Registration Requirements for Entry into the Profession

Schedule B to the Terms of Reference makes three important points under this heading. First, natural justice and fairness must be reflected in the admission criteria and application process for newly graduated and foreign trained applicants. Second, there must be objective requirements for registration and accreditation of education programs. Third, applicants should have appropriate rights of appeal affecting registration decisions.

1. The Council asked the CPBC about sections 20(1) and (2) [*19(1) and (2)*] of the HPA which provide for a registration committee that is responsible for granting registration to applicants upon satisfaction of the registration requirements. In contrast, the PA Rules and Bylaws involve the Registrar, the Membership Committee and the Board in the registration process. The CPBC responds as follows:

> *In practice, the Registrar's current responsibility is to ensure that all applications are complete. Our current application package includes: references regarding supervision requirements and character, authentic documents regarding completion of the required course work, a criminal records check, and the required fee. If their application does not meet our current registration standards, it is simply rejected at this point. If the application appears to be close to our standards but may lack some minor element, e.g., the degree is quite old and therefore the supervision requirement can not be verified beyond a limited extent because the applicant's supervisor is deceased, the application would be sent on to the Membership Committee for further review. Or if the applicant has a foreign degree with an educational approach distinct from the usual, the applicant is referred to one of the outside agencies to have their degree reviewed for equivalency.*
>
> *Applications which are complete are then sent to the Membership Committee for review. If the Membership Committee requires further*

> *information, they will request the Registrar to obtain it. Once they have ensured that all the educational prerequisites are met, they have the Registrar issue a letter telling the applicant they are eligible to register.*
>
> *The applicant must then complete a professional written examination with a passing grade and complete an oral exam reviewing their responses to questions regarding practice and local statutes and ethics related to the practice of psychology. This process is managed by the Registrar because it is a much more efficient way to proceed. Once the applicant has completed these requirements they are registered.*
>
> *Throughout the process, an applicant may first appeal to the Membership Committee if they are unsatisfied with any decision that is made. If the applicant does not agree with their decision and rationale, then the applicant may appeal to the Board. If they are still unsatisfied they may then appeal to the Supreme Court.*
>
> *In general, the Board believes that this process ensures an economical and efficient division of labour as well as ensuring that the applicant and the College follow a due process which is transparent and may be scrutinized by way of appropriate appeals.*

In the Council's opinion, the general registration process described by the CPBC is essentially very similar to that of the HPA. However, unlike the HPA, the registration process is contained in the rules under the PA, and the respective roles of the Registrar, the Membership Committee and the Board are not clearly defined. In the Council's view, it is important that the key elements of a regulatory body's registration process be set out in the professional statute, with the details of matters such as examinations by the Registration Committee, set out in the rules.

Nevertheless, the Council finds that the CPBC makes some good points about the nature of registration under the PA and gives reasons why it requires a more flexible registration structure than that under the HPA. In particular, the Council sees merit in the proposal for greater participation of the Registrar in the registration process. The Council will address this matter further under the heading "Improvements to the Health Professions Act".

3. Quality Assurance Mechanisms

Under this heading, schedule B of the Terms of Reference states that there should be effective mechanisms for monitoring practitioner competency including the ability to set continuing education requirements, and a committee of the board should be responsible for reviewing standards of practice and codes of ethics.

In its submission, the CPBC states that it has committees in each practice area made up of different specialists which develop standards of practice as required. The CPBC also notes that it has an Ethical Code and Code of Conduct specifically tailored to address the issues facing psychologists. In the Council' view, the CPBC has indicated substantial compliance with this *core principle*.

The CPBC has submitted that the model ethical code accompanying the HPA is deficient in many respects. This model code is provided by the Ministry to professions newly designated under the HPA and is intended to serve as a guideline for developing a profession specific ethical code. It is not intended that it be adopted without change by all professions. It is only intended as a guide.

4. Complaint and Disciplinary Process

A review of the HPA and the principles outlined in schedule B to the Terms of Reference indicates that a designated health profession's complaints and discipline process must, at a minimum, incorporate certain key elements:

i. the investigative and adjudicative bodies must be made up of different people and the bodies administered independently;

ii. dissatisfied complainants and registrants must be afforded rights of appeal;

iii. the process must be consistent with the rules of natural justice, and provide for proper notice of a proceeding and a right to be heard; and

iv. the process must not be complex: complainants and registrants must understand how the process works.

With these principles in mind, the Council asked the CPBC several questions about its complaints and discipline process.

At the outset, the Council is aware that the changes to the PA, the Rules and Bylaws the CPBC proposed to the Minister of Health address most of the concerns found in this section and reflect substantial agreement with many of the Council's suggestions. Nonetheless, the Council was requested to review the current legislation governing psychology and the Council has the following concerns about the current complaints and disciplinary process.

The general process under the PA involves the Registrar, the Professional Standards Committee and the Board. Generally, the Registrar is responsible for initial review of complaints, as well as general investigatory matters. The Registrar also retains some jurisdiction to dismiss complaints. The Professional Standards Committee is then responsible for determining whether the complaint should be dismissed or whether a hearing should be held. The Committee also has the jurisdiction to resolve complaints through registrants' undertakings. Decisions of both the Registrar and the Professional Standards Committee are subject to appeals internally through the CPBC. Formal disciplinary hearings are conducted by the Board.

1. The Council asked the CPBC a general question about its complaint process. In its response, the CPBC states that it favours its current process. Specifically, it prefers that the Registrar carry out the actual investigation because he or she has more training in the procedural matters of conducting an investigation than the inquiry committee members (the Professional Standards Committee in the PA). With respect to the HPA requirement that all complaints be investigated, the CPBC states that investigating all complaints does not make sense because some complaints are *res judicata*, are outside its jurisdiction, are vexatious and trivial, or are simply impossible to understand. Thus, the Registrar is responsible for determining whether a complaint is made out on a preliminary basis. The CPBC also makes reference to its revised Bylaws and states that currently, the Registrar does not adjudicate any complaints and that the CPBC adheres to the criteria set out in section 33(6) [*32(4)*] of the HPA.

In the Council's view, the general process under the current PA Bylaws, while in some respects similar to that of the HPA, is not in accordance with the *core principles*. The Council's primary concern is that the Registrar appears to have a very broad mandate to deal with complaints, at least as those matters are stated in the bylaws. Under Bylaw 4.8, the Registrar may take no further action if "the complaint is not valid". Although in its response the CPBC states that the Registrar does not "adjudicate" complaints, Bylaw 4.8 gives the Registrar very broad powers to dismiss complaints. While the Council has, in previous reports, acknowledged the useful role that the Registrar can play in initially reviewing complaints, it is important that the Inquiry Committee have the primary role of assessing complaints.

In addition, unlike the process under the HPA, the PA has no provision for a separate discipline committee as all hearings are conducted by the Board. The Terms of Reference indicate that the HPA reflects the *core principles* of professional regulation, and in the Council's view, it is important that a regulatory college make provision for a separate committee to deal with such matters.

Nevertheless, The Council notes that the CPBC has made some valid submissions regarding the process for conducting investigations, particularly in respect of the Registrar's involvement, and will further elaborate on this issue under the heading "Improvements to the Health Professions Act".

2. The Council asked the CPBC about the procedural requirements for the inquiry committee, such as those set out in section 33(5) [*32(3)*] and Bylaw 45, now bylaw 61(2) of the HPA, and whether the Professional Standards Committee or the Registrar adheres to these requirements. The CPBC concedes that although no procedural requirements are enumerated, it currently follows such processes. The CPBC also mentions that these procedural requirements are found in the proposed Bylaws. The Council finds that procedural requirements are minimum standards for adhering to the principles of fairness and thus, should be contained in the professional statute, not in the bylaws, and notes in any event that the CPBC does not appear to object to these provisions.

3. The CPBC approves of the appeal procedure outlined in section 34(1) and (2) [*33(1) and (2)*] of the HPA but points out a potential conflict of interest within its Board if such procedure is followed.

The HPA appeal procedure is as follows: Section 34(2) [*33(2)*] provides a complainant a right of appeal to the board regarding the inquiry committee's decision not to refer the matter to the discipline committee, pursuant to section 34(1) [*33(1)*]. On the other hand, the appeal process under the PA and its Rules is as follows: Bylaw 4.28 provides for a right to appeal a decision of the Registrar to the Professional Standards Committee. Bylaw 4.32 provides for a right of appeal from a decision of the Professional Standards Committee to the Professional Standards Appeal Committee. The latter body's decision is reviewable by the Supreme Court, pursuant to Bylaw 4.33. The Board hears complaints pursuant to the issuance of a Bill of Complaint by the Professional Standards Committee, according to Bylaw 4.14(c).

The Council believes that the establishment of a discipline committee separate from the Board will eliminate any potential conflict of interest with regard to internal appeals, and is itself one of the reasons why a separate discipline committee should be established.

4. The Council believes that Bylaw 4.24 of the PA should be removed. This bylaw provides that if the hearing panel is equally divided and cannot reach a decision the complaint shall be deemed dismissed. The CPBC appears not to object to removing this provision as it states that its hearing panels now have only three individuals which eliminates the problem.

5. The CPBC has some concerns regarding section 51(3) [*50(3)*] of the HPA which prohibits prosecution of offences after two years.

In particular, the CPBC states:

> *First, the wording of section 50(3) does not even state that this limit is timed from the date at which the complainant is aware that he/she has suffered harm from the health professional. Very often, patients wait years before they understand the inadequacy or unethical nature of a health professional's actions. They then may become aware because of subsequent health problems, information from another health professional, or self-study. Creating a statute of limitations based on the date of the actual offence is unfair to complainants, and is harmful to the public.*
>
> *Second, a two-year statute of limitations is inadequate in any event. A large proportion of complaints against psychologists occur later than two years after the alleged offence. Currently, we have active ethics complaints which if substantiated, will likely result in the suspension of psychologists' registration. Currently, we have complaints of sexual impropriety against a psychologist stemming from actions between four and fourteen years ago. If the College of Psychologists is forced to use a two year statute of limitations, these female members of the public would not be protected.*

The Council considers this concern to be somewhat misplaced. The two-year prohibition stated in section 51(3) [*50(3)*] of the HPA refers only to the offences listed under the HPA, which are sections 13(1), (2), (3) and (4) [*13(1), (2), (3) and (4)*], 20(5) and 31(1) and (2) [*19(4) and 30(1) and (2)*]. These provisions create offences for practising a designated health profession under the HPA when prohibited to do so, for registering or continuing to be registered as a member when not qualified to do so, and for obstructing an inspector in his or her lawful performance of his or her duties. Section 51(3) [*50(3)*] of the HPA does not apply, for example, to offences under the Criminal Code, nor does it apply to disciplinary matters internal to the health profession colleges. In other words, it does not prevent a college from pursuing disciplinary matters against registrants.

6. The CPBC does not object to the following procedures set out in the HPA and not found in the PA:

i. section 36 and 36(2) [*35 and 35(2)*] of the HPA which empower the inquiry committee (the Professional Standards Committee in the PA) to resolve complaints through the use of registrants' undertakings and consents;

ii. section 37 [*36*] of the HPA which requires the inquiry committee to furnish the complainant with a notice of hearing and to advise the respondent that the committee may proceed in his or her absence;

iii. section 37(4) [*36(4)*] of the HPA which empowers the inquiry committee or the board to direct the Registrar to cancel a citation if the inquiry committee or the board afterwards determines that a hearing by the discipline committee is not required;

iv. section 38 [*37*] of the HPA which sets out the procedure for a discipline committee hearing and allows the complainant the right to appear as a party;

v. section 40(5) [*39(5)*] of the HPA which requires a notice of appeal to be served on a complainant; and

vi. sections 13 and 51 [*13 and 50*] of the HPA which make it an offence for a registrant to violate his or her terms of registration, and sections 31 and 51 [*30 and 50*] of the HPA which make it an offence to obstruct an inspector in the lawful performance of his or her duties.

Finally, as a general point, the Council notes that under the PA, the vast majority of the provisions relating to complaints and discipline are contained in the rules and bylaws. In the Council's view, it is important that the basic structure of the complaint and disciplinary process be set out in the professional statute as is the case under the HPA.

5. Accountability Mechanisms

1. Schedule B to the Terms of Reference, under the heading Accountability Mechanisms states that there should be a requirement for government approval of rules or bylaws. Such a provision is embodied in section 19(3) [*18(3)*] of the HPA. Further, section 19(5) [*18(5)*] provides that the Minister may request a board to amend or repeal an existing bylaw or make a new bylaw for the college if the Minister is satisfied that this is necessary or advisable. Section 19(6) [*18(6)*] of the HPA provides that where a board does not comply with a request under section 19(5) [*18(5)*], the Lieutenant Governor in Council may amend or repeal the existing bylaw for the College or make the new bylaw for the College.

The CPBC approves in principle the requirement for government approval of rules or bylaws.

2. Finally, the Council observes that the CPBC offers no objections to the following provisions of the HPA:

i. section 22 [*21*] of the HPA which provides that the register and the bylaws of the college shall be open to inspection by any person; and

ii. Bylaw *28* now bylaw 32 of the HPA which provides that the board must appoint either a chartered accountant or a certified general accountant to be the auditor of the financial statements submitted by the Registrar at the end of each fiscal year.

6. The Health Professions Act Bylaws

The Terms of Reference direct the Council to conduct a comparative analysis of the HPA with each professional statute, along with any relevant rules, regulations or bylaws, in order to ensure that they contain the *core principles* of professional regulation. The Terms of Reference also indicate that the HPA embodies those *core principles* of professional regulation which the Minister considers are desirable or essential for regulating the profession in the public interest.

In the initial phase of the review process, the Council also considered the HPA draft bylaws. These bylaws are distributed to newly designated professions as a guide for drafting bylaws for their new regulatory colleges. Several questions in the Council's comparative analysis referred to the draft bylaws. The Council informed the professions that although the bylaws were not legally binding, they reflected the

Ministry's view of provisions which were desirable for regulating a profession in the public interest.

During the review process, the original draft bylaws were substantially rewritten, and many provisions were removed and some added. This complicated the Council's process as its initial questions referred to the original draft of the bylaws. The revisions also underscored the fact that the bylaws were not legally binding, and subject to modification, making it somewhat difficult to assess which bylaw provisions embody *core principles* of professional regulation.

Nonetheless, many provisions appear in both versions of the draft bylaws, and are also consistent with the *core principles* discussed in the Terms of Reference. The Council felt it important to note where provisions in the PA could be considered inadequate, incomplete or missing having regard to the draft bylaws. The Council has decided to include its account of such provisions in this separate section in order to reflect the fact that the bylaws have a different legal status than the HPA.

In its review of the PA, the Council notes the following:

1. The Council asked the CPBC about Bylaw 39(2), now bylaw 57(1)(b) of the HPA which requires that a registrant who has not practised for five years must successfully complete the examination required by the board prior to receiving his or her renewal of registration. The CPBC accepts the need for such a provision. It refers to its proposed changes to the PA Bylaws wherein Bylaw 5.4 sets out similar requirements as the HPA counterpart, except that the PA Bylaw makes reference to three instead of five years absence from practice. The CPBC finds that an absence from practice of over three years may be too long in psychology. The Council accepts this view, and again points out that the bylaws are simply guidelines, and may be subject to modification for individual professions.

2. The Council also notes that the CPBC perceives some problems with regard to Bylaw 47, now bylaw 57 of the HPA, which provides that a person whose registration has been revoked may, after the expiration of one year from the date of revocation, apply to the registration committee for reinstatement of registration. The CPBC argues that this restricts the powers of its Board and that the latter may wish to set a period of time greater than one year and/or may want to set a number of conditions to be met prior to considering reapplication. In the Council's view, simply providing a right to re-apply in no way affects a regulatory college's discretion as to whether such application will be accepted, and such a provision should be contained in the CPBC's rules or bylaws.

3. Bylaws 11 and 23(3), now bylaws 12(4) and 23(3) of the HPA provide that meetings of the board of the college as well as all committee meetings must be open to the public. These provisions also create a discretion to close meetings in certain circumstances. Bylaw 4.27 of the PA states that all disciplinary proceedings shall be closed to the public save and except for the complainant who may attend at his or her discretion. The Council also notes that said Bylaw has been retained under the proposed PA Bylaws, under Bylaw 11, now Bylaw 12(4).

The CPBC is opposed to this provision. It states:

> *Making disciplinary hearings open to the public will be undesirable to a large number of complainants. This is especially true in the mental health area given the still common stigma of mental health problems. While 37(a) and (b) allow non-public hearings in certain cases, it should be obvious that the popular media, depending on the anticipated titillating or scandalous content of the hearing, will fight against closed hearings if there is an opportunity for an open hearing. In fact, the spectre of a public hearing in which one's mental health and/or sexual history are examined and cross-examined may lead to fewer complaints by legitimately harmed patients.*

The CPBC also submits that the public may have copies of the Board minutes subject to the Freedom of Information and Protection Privacy Act. It believes that publishing its hearing decisions in the newspapers would be adequate, subject to similar restrictions as currently apply in the criminal system.

The Council believes that meetings of the CPBC Board as well as the registration, inquiry and discipline committee should generally be open to the public, subject to a discretion to exclude the public in certain circumstances. To the extent that other research committees may be established, the Council believes that their meetings need not necessarily be open to the public. The criteria for holding proceedings in camera are set out in section 11 now section 12 of the HPA Bylaws and provide as follows:

> *(4) Subject to subsection (5) and section 13, meetings of the board must be open to registrants and the public.*
>
> *(5) The board may exclude any person from any part of a meeting if it is satisfied that*

(a) *financial or personal matters may be disclosed of such a nature that the desirability of avoiding public disclosure of them in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that meetings be open to the public,*

(b) *a person involved in a criminal proceeding or civil suit or proceeding may be prejudiced,*

(c) *personnel matters or property acquisitions will be discussed, or*

(d) *instructions will be given to or opinions received from legal counsel for the college, the board, or committees.*

(6) *If the board excludes any person from a part of a meeting, it must have its reasons for doing so noted in the minutes of the meeting.*

23. *(3)* *The provisions of section 12(2) to (6) and (8) to (10) apply to a committee or a panel as if it were the board.*

In the Council's view, the HPA provisions, whereby meetings are generally open to the public subject to a discretion to close meetings in certain circumstances, is to be preferred. The foregoing criteria for deciding when a meeting should be closed are sufficient to address the CPBC's concern.

4. The Council asked the CPBC about Bylaws 11, 13 and 15, now bylaws 14(2), 15(2) and 16(2) of the HPA which provide for the composition of the registration, inquiry and discipline committee which must include one elected member, three registrants and one ministerial appointee. The CPBC has no major objection to the general composition of these committees set out in the HPA.

5. Finally, the Council makes the following observations regarding various bylaw provisions:

i. The CPBC offers no substantial objections to Bylaw 39(5)(b), now Bylaw 54(3) of the HPA which permits an applicant three opportunities to take an examination.

ii. The Council asked the CPBC whether it provides for a mediation process as found in Bylaw 44, now Bylaw 63 and section 33(6) [*32(4)*] of the HPA. The CPBC indicates that its proposed bylaws include mediation.

iii. The CPBC does not object to the requirement for the Board to keep records of the results of all investigations of the inquiry committee and all decisions of the discipline committee, and to publish a notice where disciplinary proceedings result in limitations or suspension of a registrant's practice. These are in accordance with Bylaws 46 and 49(1)(c), (d) and (e), now Bylaws 66 and 44(d) of the HPA.

iv. Lastly, the CPBC agrees with Bylaw 42, now Bylaw 97 of the HPA which provides for mandatory liability insurance.

7. General Conclusions from Comparative Analysis

After a careful review of the PA, its Rules and Bylaws, the Council is of the view that the legislation regarding the profession of psychology is inconsistent in several material aspects with the *core principles* of professional regulation. On some important issues, notably those related to the complaints and discipline process, the mandate of the regulatory body and accountability mechanisms, the Council found several provisions to be inadequate, incomplete or missing having regard to the *core principles* embodied in the HPA and discussed in the Terms of Reference.

B. IS THERE A NEED FOR A SEPARATE ACT?

The Council proposes to address this issue by discussing the general policy favouring designation and the profession specific arguments regarding designation.

1. The General Policy Favouring Designation

As stated in the introduction to this report, the Terms of Reference reflect a general policy that designation is the favoured option, and that a profession must **justify** a continuing need for a separate statute. The Council would like to expand on this important issue.

Under the existing regulatory system, each profession is governed by its own professional statute. The terminology used as well as the regulatory structures and processes created vary widely from profession to profession, especially with respect to the complaints and discipline process, as suggested in the report of the Seaton Commission. This variation and resulting complexity is confusing to the public and registrants. In the Council's view, a uniform regulatory system under the HPA would eliminate much of the complexity and confusion, and foster the development of a common jurisprudence for the health professions.

Several recent reports of Royal Commissions and government policy statements have emphasized that an integrated approach to the delivery of health care is in the public interest. Coordination and cooperation amongst health care providers is of fundamental importance to such an approach, and in the Council's view, a uniform regulatory structure enhances the government's ability to apply health care policy consistently.

One policy initiative for which coordination and consistency is particularly relevant is the scope of practice review process the Council is currently conducting. The Ministry has requested that the Council review the scopes of practice of the existing professions with a view to implementing a new regulatory framework for health professions in British Columbia. The key elements of the new framework are broad, non-exclusive scope of practice statements and narrowly defined reserved acts. Reserved acts are those elements of a profession's scope of practice which present such a significant risk of harm that they should be reserved to a particular profession that is qualified to perform them. The new system will create shared scopes of practice, and it is likely that many of the reserved acts will be shared amongst several professions. In the Council's view, a uniform regulatory structure would ease the implementation of the new model of professional regulation.

A general policy favouring a uniform regulatory structure was referred to in the report of the Seaton Commission on Health Care in BC. The following excerpts are from that part of the Commission's report which deals with regulation of the health professions:

> *There is a lack of consistency among the 16 provincial acts that govern the health care professions, despite the fact that all of the colleges established under the acts have the same legislative mandate: to protect the public from preventable harm. Such inconsistency increases the likelihood of variations in judicial interpretations of the acts. Underlying this situation are persistent jurisdictional disputes and a distinct lack of cooperation among the health care professions.*

> ...
>
> *In general, a lack of consistency characterizes the acts with respect to complaints, discipline and appeals, resulting in insufficient public accountability, no uniformity in the structure or organization of the different statutes, and an absence of common terms.*
>
> ...
>
> *The Health Professions Act has the potential to influence significantly the future of self regulation of health care professions. Under this new Act, the Health Professions Council can make recommendations to the minister concerning which groups should be granted self-regulation status, their titles, and the extent of their scopes of practice, if any. The Act could be used to create uniform legislative procedures.*

These views led the Commission to conclude that the existing health professions acts should be repealed and the HPA revised to serve as the umbrella act for regulating health professions.

The general policy of legislative uniformity is also consistent with initiatives in several other provinces, notably Ontario which has implemented umbrella legislation for the health professions and Alberta which is in the process of enacting umbrella legislation. The Council agrees with these statements about the desirability of uniformity in legislation and accepts that, as a general rule, designation under the HPA is the preferred option. This general policy favouring designation is embodied in the Terms of Reference which refer to the desirability of a "*high degree of consistency between statutes*" and of "*minimiz[ing] the number of statutes that apply to the governance of health professions*". Indeed, the Terms of Reference and attached Criteria and Guidelines make it clear that the Council is to consider whether there are unique features of the profession or other relevant factors that justify a need for a separate statute.

However, the Council again emphasizes that although the policy preference is for uniform legislative structures, the HPA model still embodies a strong commitment to self-regulation through the "college" system of regulation.

With this in mind, the Council proposes to now review the arguments presented by the CPBC and the BCPA which they believe justify the continuing need for a separate statute.

2. The Profession Specific Arguments Regarding Designation

The CPBC and the BCPA are strongly opposed to the designation of psychology under the HPA.

The CPBC and the BCPA first argue that the HPA is not suitable for regulating the practice of psychology because the HPA is oriented towards health professions. They state that the HPA definition of a health profession is worded in such a way as to exclude a large number of psychologists. The CPBC states that while most psychologists would fall within the definition of "health profession" as set out in the HPA, many (approximately 17%) of its members would not. For example, the CPBC notes, industrial and organizational psychologists and research and teaching psychologists would not meet this definition. The CPBC believes that as a result these persons would not be able to register under the HPA, and the public interest would be compromised. In short, the CPBC is concerned that certain of its present registrants would not be covered by the HPA.

The Council disagrees with the CPBC and BCPA's conclusion in this regard. The reference to "health profession" appears in section 1 [*1*] of the HPA:

> ***"health profession"*** *means a profession in which a person exercises skill or judgment or provides a service related to*
>
> *(a) the preservation of the health of individuals, or*
>
> *(b) the treatment or care of individuals who are injured, sick, disabled or infirm.*

The Council also notes that s.5(1) of the public interest criteria set out in the Health Professions Regulation states:

> *For the purposes of section 10(1) of the Act, the council must consider the extent to which the practice of a health profession may involve a risk of physical, mental or* ***emotional*** *harm to the health, safety or well being of the public, . . .* (Emphasis added)

The Council considers this definition is broad enough to include anyone providing psychological services.

A related concern raised by the BCPA is that because psychology encompasses a wide range of non-physical conditions, the HPA is not an appropriate regulatory structure. Further to this, the BCPA states that the HPA is oriented solely towards health professions, and lacks the refinement necessary to regulate psychology. The Council disagrees with this submission. First, nothing in the HPA indicates that it is restricted to the regulation of professions which treat only physical conditions. Further, neither the CPBC nor the BCPA provided any specific examples of provisions in the current PA which reflect the unique characteristics of the profession, and which are not already contained in the HPA. Indeed, the HPA is, in essence, very similar to the present PA in terms of the regulatory structure it creates. There is provision for a college, a disciplinary process, title protection and various accountability mechanisms. Even the CPBC acknowledges that in many ways, the HPA provisions are better suited to the protection of the public than the PA. It states that:

> *...The Board was of the opinion that much of the HPA could be directly applied to the profession of psychology. Thus, in the interests of consistency in legislation, the College would not object to most of the sections as set out in the HPA.*

In any event, the Council considers that in many respects the most important aspect of a regulatory statute is the rule-making power granted to the regulatory authority. This is because it is through the rules (or by-laws) that the regulatory body deals with the profession-specific matters which most affect its members in their practice. And in this respect, the Council notes that the rule-making power granted to the professions under the HPA is broader than under the PA. Finally, the Council understands that in Ontario, which has adopted umbrella legislation for the health professions, the practice of psychology is a profession subject to the general regulatory regime established under the Regulated Health Professions Act.

Second, the CPBC contends that currently, a large number of health psychologists such as school psychologists and mental health psychologists are exempt from the PA. Many of these individuals do not meet the current registration criteria of the CPBC. The CPBC is concerned that these exemptions would disappear if psychology is designated, and as a result, the currently exempted individuals would not be able to practice their profession if designated under the HPA. The College is referring to section 28 of the PA which states:

> ***Exemptions***
>
> ***28*** *(1) Nothing in this Act prevents a person*

(a) who is authorized to practise a profession under an Act from practising that profession,

(b) from teaching, lecturing or engaging in research as a psychologist, if those activities are carried out by reason of, and in the course of, duties under an academic appointment or program in a university as defined by the University Act, or

(c) from acting in the course of employment by a Provincial, federal or municipal government or government agency or board of school trustees constituted under the School Act, if qualifications in psychology are a condition of employment.

(2) Nothing in this Act prevents

(a) a person to whom subsection (1)(b) or (c) applies from using the title "psychologist" or an affix, prefix or abbreviation of the title, or

(b) a society whose members are persons to whom subsection (1)(b) or (c) applies from using a title or designation incorporating the word "psychology", "psychological" or "psychologist".

The Council does not believe that this issue supports the retention of a separate statute.

If it should it be determined that these exemptions are valid and should remain, it would be relatively simple for the government to ensure that they continue to exist, regardless of the form of legislation under which psychology is regulated. The HPA being a general statute, will not contain provisions for the reservation of titles or exemptions for specific professions. That will be dealt with in the regulation governing a profession and in the case of psychology the regulation could maintain the current exemptions. Further, the position of the CPBC in this regard appears at odds with its submission in connection with the scope review wherein they urge the repeal of the exemption provisions.

Third, the CPBC believes that an integral part of possible designation is setting out the scope of practice for psychology, and the CPBC is concerned that the scope definition process is "*more political than empirical*". The Council fails to see how this point relates to the issue of designation under the HPA. The process of developing a scope of practice statement is currently being undertaken by the Council as part of its scope of practice review process, and the Council wishes to emphasize that "political" considerations have absolutely no bearing on the Council's deliberations. More importantly though, the Council does not believe that the process of defining scope of practice has any relevance to the issue of whether psychology should be designated under the HPA. Whether a profession is governed under the HPA or an individual statute, a scope of practice statement is a key element of the legislative instrument.

Finally, the CPBC concludes that designation of psychology under the HPA would restrict membership and cause other unintended effects which would reduce the degree of protection the public might have. The CPBC suggests instead that the PA be amended in such a way so as to conform more closely to the HPA.

In the Council's view, the submissions by the CPBC and the BCPA do not address the fundamental issue raised by this review which is whether psychology should be designated under the HPA or, because of its unique characteristics, continue to operate under a separate statue. The Council appreciates that psychology, like all other health professions, has unique characteristics. However, the Council's question regarding designation was intended to raise the issue of how these unique characteristics **justify** the retention of a separate statue. In other words, the psychologists were asked to relate their unique characteristics to the issue of how they are regulated. In the Council's view, this they have failed to do. Further, as noted, the CPBC appears to concede that the HPA structure would in many ways be an improvement on the present system.

The Council has concluded that the unique characteristics of psychology can be accommodated under the regulatory structure set out in the HPA, and the CPBC and the BCPA have failed to demonstrate how such characteristics favour the retention of a separate statute.

C. THE COUNCIL'S CONCLUSION REGARDING DESIGNATION

As noted in the introduction to this report, in determining whether a profession should be designated under the HPA the Council must balance the extent to which the present professional statute embodies the *core principles* of professional regulation and whether there are unique features about the profession or other relevant factors that justify the continuing need for a separate statute.

In considering this matter, the Council believes that the legislation regarding psychology is for the most part inconsistent with the *core principles* of professional regulation. Further, in the Council's view, the arguments regarding the need for a separate statute are not persuasive. Therefore, the Council recommends that the profession of psychology be designated under the HPA.

The Council would like to emphasize that the HPA still provides for self-regulation, albeit with different processes and structures, and a college designated under the HPA still has the same fundamental purpose of governing the profession in the public interest. All professions designated under the HPA would continue to be governed, in part, by a Regulation containing provisions to deal with profession specific matters. The HPA also provides a college with extensive bylaw making powers including the power, set out in section 19(1)(t) [*18(1)(r)*] of the HPA, to establish any "*other committees the board determines are necessary or advisable*".

In the Council's opinion, the enactment which has the greatest impact on the activities and conduct of the members in the day to day practice of their profession is clearly the College itself with its rules, regulations and bylaws, not the statute which creates them. Regardless of whether the relevant statute is the PA or the HPA, from the members' perspective, it is the CPBC which has the primary role. In that regard the Council notes that the bylaw making power under the HPA is broader than the power which currently exists under the PA.

In summary, the Council is of the view that the CPBC and the BCPA have not presented any significant reasons which justify the continuing need for a separate statute. In particular, the CPBC and the BCPA have failed to indicate how the unique characteristics of psychology cannot be accommodated under the regulatory structure set out in the HPA.

D. IMPROVEMENTS TO THE HEALTH PROFESSIONS ACT

In the course of its review of the PA, the Council has determined that there are several matters upon which the HPA could be improved. These include the following:

1. Section 20(1) [*19(1)*] of the HPA provides that the registration committee is responsible for granting registration to applicants. The CPBC sets out in detail its current application process which involves the Registrar, the Membership Committee and the Board. The Council agrees that for professions such as psychology, in which the requirements for registration are clear, and many applications for registration are received, the Registrar can play a greater role in the approval of applications. Therefore, the Council recommends that section 20 [*19*] of the HPA be modified to

provide for a more flexible registration process, including a Registrar's review in appropriate circumstances.

2. As regards the CPBC's complaint process and its objection to the inquiry committee's role under the HPA, the Council notes that the HPA does not intend that the inquiry committee must conduct an investigation in all cases. Although s. 33(6)(a) [*32(4)(a)*] of the HPA states that all complaints must be investigated, it is prefaced by the words *"[w]here a complaint is delivered"* found in s.33(1) [*32(1)*], thus indicating that in some cases complaints will not be referred.

Further, the Registrar may also be designated as an inspector, pursuant to section 27(2) [*26(2)*] of the HPA, and the Registrar is mandated to deliver to the inquiry committee a copy of the complaint, an assessment thereof and any recommendations for the disposition of the complaint, according to section 32(2) [*31(2)*] of the HPA.

In the Council's view, the HPA clearly intended that the Registrar would be able to deal with minor complaints summarily, and the inquiry committee would only need to conduct an investigation in cases where the Registrar refers the matter to that committee. The Council agrees that a Registrar or other designate can play an invaluable role in the initial handling of complaints. However, in the Council's view it is important that the inquiry committee be primarily responsible for determining whether a disciplinary hearing should be held.

Therefore, the Council recommends that the HPA be clarified to more clearly state that an initial summary review process is appropriate. In particular, the Council believes that the Registrar should be given the discretion to dismiss complaints in the circumstances set out in section 33(6) [*32(4)*] of the HPA. The Council also believes that the Registrar should clearly be granted the jurisdiction to mediate complaints. The Council emphasizes, however, that any decision by the Registrar to dismiss a complaint should be subject to an internal appeal.

The Council expects that further improvements to the HPA will come to its attention as it proceeds through the review process for each of the existing professions. The Minister has asked that the Council's final report deal with all professions, and the Council intends to include in the report a comprehensive list of suggested improvements to the HPA.

II. RECOMMENDATION

The Health Professions Council recommends to the Minister of Health and Minister Responsible for Seniors that the Psychologists Act be repealed and the profession of psychology be designated under the Health Professions Act.

Appendix: The Terms of Reference and the Criteria and Guidelines.

**For the Appendix *Terms of Reference and Guidelines*,
please refer to the Appendix in Part II, Volume 1 – Legislative Review**